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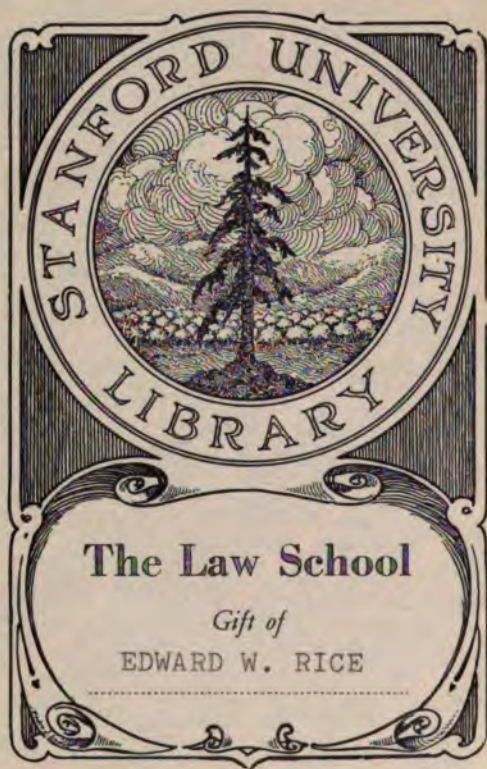
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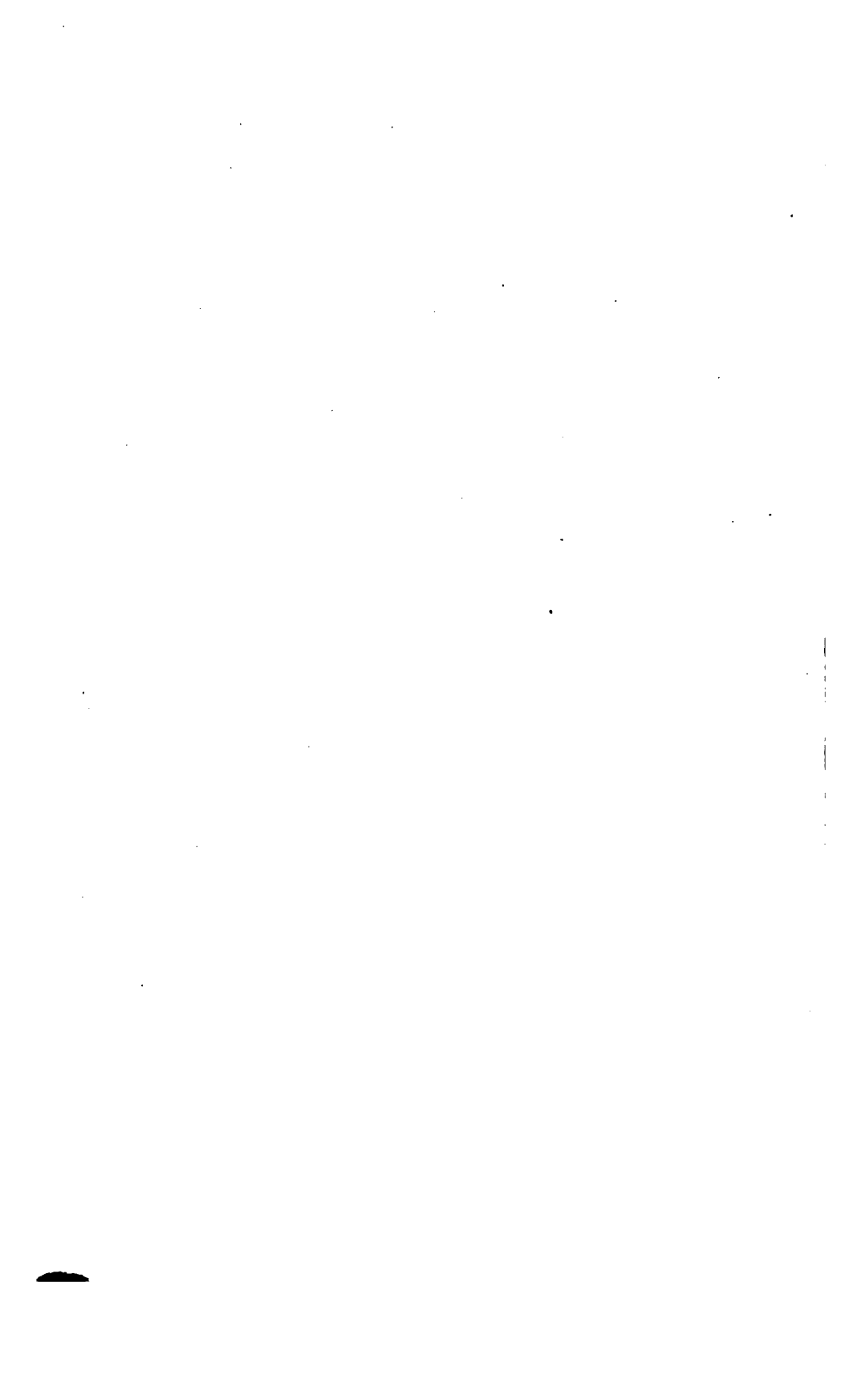
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A
TREATISE
ON, THE
LAW OF MORTGAGES,

BY THE LATE
JOHN JOSEPH POWELL, Esq.
BARRISTER AT LAW.

THE FIFTH EDITION,
WITH COPIOUS NOTES
AND AN
APPENDIX OF PRECEDENTS;

By **THOMAS COVENTRY, Esq.**
OF LINCOLN'S INN.

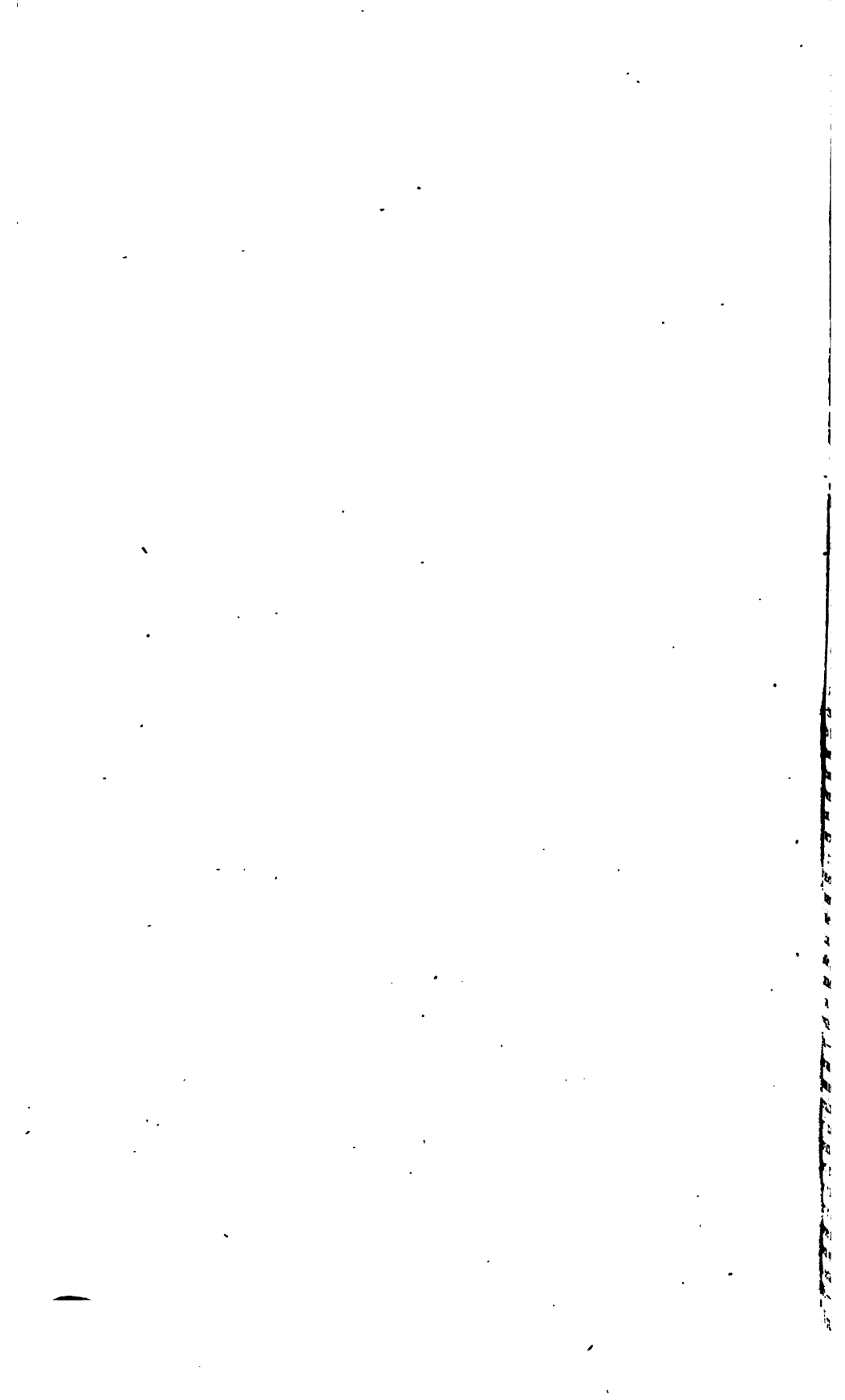
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CAPUT XIV.

[569]

OF NOTICE EXPRESS AND IMPLIED (A).

NOTICE [is a creature of equity, and] is of two kinds. (b) First, actual notice, as where a man is party to a deed, or his notice of it regularly served upon him, or the like.

*Actual notice;
what.*

But the charge of *actual* notice must be founded upon something certain and circumstantial: Thus (a), where one came to a vendee, and said to him, "Take heed how you buy such land, for A. hath nothing in that, except upon trust to the use of B.;" and another came to the vendee and said to him, "It was not as he was informed, for A. was seised of this land absolutely," by which the vendee bought the land; the question was, whether the first caveat given to the vendee was a sufficient notice of the trust or not? The Lord Keeper said,

*Vague reports
from strangers,
no notice.*

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(a) *Wildgoose v. Wayland*, Gouldsb. 147, ca. 67., [and *Cornwallis's Ca.* Toth. 254.—Ed.]

(A) This chapter treats, 1st. of constructive notice, arising from vague reports, recitals in, and contents of title deeds, and generally from whatever puts a party on inquiry, from 569 to 588; 2d. of notice to agents, attorneys, counsel, and scriveners, from 588 to 601; 3d. of the effect of notice to the original mortgagee on his assignee from 601 to 603; 4th. of notice created by the bankrupt laws, from 603 to 605; 5th. of notice created by judgments, from 606 to 626; 6th. of the protection afforded by attendant terms when the party has actual notice of judgments, from 626 to 634; 7th. of notice created by registration, from 634 to 641; 8th. of the compulsory modes of discovering deeds when a purchaser denies notice, from 641 to 645; 9th. of derivative notice, from 645 to 647; 10th. of objections to the case of *Strode v. Blackburn*, from 647 to 677; and, lastly, of the effect of voluntary settlements on purchasers and creditors with and without notice, from thence to the end of the chapter.

*Contents of
chapter.*

(B) Actual and presumptive; but there is no difference as to actual and presumptive notice in its consequences, except perhaps as to guilt: if there were, every kind of constructive notice might then be avoided by employing an agent, per Lord Northington, in *Sheldon v. Cox*, 2 Eden, 241. S. C. Amb. 626.

*No difference
between actual
and presump-
tive notice.*

that it was not; for flying reports were many times fables, and not truths; and if this should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered (c).

Presumptive notice, what.

Secondly, Presumptive notice, which is a *conclusion* of law (where, by the exercise of common diligence, without any extraordinary precaution, a man cannot but acquire a knowledge of a fact) that he has notice thereof, although no *actual* proof of notice be exhibited against him (D).

Steward of a manor presumed consent of admittances.

Thus (b), where A. a copyholder in fee, mortgaged to J. S. who was admitted by B. the steward of the manor; and afterwards A. made a second mortgage to C. who was also admitted by B.; and then a mortgage to B. who bought in J. S.'s se-

(b) *Brotherse v. Bence*, Fitzg. Rep. 118. 2 Eq. Ca. Abr. 615, pl. 11.

Actual notice.

(C) Actual notice requires little exposition. To render it binding, it must be given to the person about to purchase, or to his agent, attorney, or counsel, during the pendency of the treaty, or at least before the conveyance or mortgage is executed, or the money actually paid, as distinguished from its being secured to be paid. *Hardingham v. Nichols*, 3 Atk. 504. *Maitland v. Wilson*, ib. 814. Et vide *S. L. Cantrell v. Mannington*, Finch, 219. In *Fry v. Porter*, 1 Mod. 300, Hale, C. B. is speaking of the point of notice, said, "Here are several circumstances that seem to shew there might be notice, and a public voice in the house, or an accidental intimation, &c. may possibly be sufficient notice." But in *Butcher v. Stapely*, 1 Vern. 363, where there was no direct proof of notice, save that some neighbours in discourse said, that they heard the defendant Butcher had previously sold the estate to the plaintiff,—this, was held insufficient to affect the purchaser with a knowledge of such sale. See also *ante*, p. 438, of this edition, n. (I).

Public rumour.

Action for slander of title will lie, when.

As to slander of the vendor's title, it is observable that an action on the case may be maintained against the slanderer, if it can be proved that he uttered the report with a malicious intent. *Smith v. Spooner*, 3 Taunt. 246; see also *Roue v. Roach*, 1 Maul. & Selw. 304; and *Pitt v. Donovan*, ib. 639. But an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any person about to buy the estate, although the sale be thereby prevented; nor will the action lie against the attorney, although he do not deliver the precise message of his principal, provided it be to the same effect. *Hargrave v. Le Breton*, 4 Burr. 2422.

Taking mortgage without deeds, not notice of person's title who holds them.

(D) The numerous cases on the doctrine of notice render it difficult to define exactly what may be said to amount to constructive notice and what not. Lord Hardwicke felt this difficulty in *Amb. 314*, yet some general rule, he said, must be observed. Lord C. B. Eyre took constructive notice to be no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. If, therefore, continued the learned Baron, a mortgagee have a deed put into his hands which recites another deed, which shews a title in some other person, the court will presume him to have notice, and will not permit any evidence to disprove it. The only reason that could raise in the case before him a notion of constructive notice, was, that the deeds were not forthcoming. But was it possible that this circumstance could, of itself, be notice of the hands into which they were fallen, or the purpose to which they had been applied? At the utmost it could only be a circumstance of evidence, to shew that there was reason for further inquiry; but being unsupported by any other circumstances it proved nothing. *Plumb v. Fink*, 2 Austr. 438.

cure; it was decreed that B. should not postpone C.; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when C. was admitted, must know or have notice of the *same* mortgage to C. (E).

Where a purchaser cannot make out a title but by a deed, which leads him to a fact material to it (c), he will not be deem-

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Purchaser presumed to have notice of all facts contained in deeds necessary to his title (F).

(c) *Moore v. Bennett*, 2 Ch. Ca. 246. Gilb. Rep. Eq. 8. 1 Ch. Ca. 291. [acknowledged by Lord Hardwicke in *Mertins v. Jolliffe*, Amb. 314, in

which case the same law was laid down.—Ed.] *Dunch v. Kent*, 1 Vern. 519.

(E) And note, that the entry of the prior incumbrance must, to postpone the steward of a copyhold estate, be made during his own time. Where a third mortgage was entered in a wrong book, the fourth mortgagee was held to have no notice of it; and it was therefore decreed, that the third mortgagee should be postponed until after the fourth was satisfied. *Welsh v. Warren*, 2 Eq. Ca. Abr. 595, pl. 9, cited also *supra*, p. 557, of this edit. n. (B) sec. 3. The rule *qui prior, &c.* seems to have been disregarded in this instance, unless, beyond the point of notice, the third mortgage was defective for want of a correct entry.

Copyhold mortgage entered in wrong book, no notice.

In *Hansard v. Hardy*, 18 Ves. 462, the late Master of the Rolls seems to have doubted whether a person purchasing a copyhold estate must be presumed to have notice of every thing on the court rolls relative to it. This doubt has since been removed in a late case before the present Vice-Chancellor, who held, that the court rolls are the title deeds of copyhold estates, and that a purchaser shall be affected with notice of the contents of the court rolls as far back as a search is necessary for the security of the title. *Pearce v. Newlyn*, 3 Madd. Rep. 188.

Contents of court rolls, no title.

(F) And generally, notice of a deed is notice of the contents of that deed, so far as those contents affect the transaction in which notice of the deed is acquired. *Hamilton v. Royse*, 2 Sch. & Lef. 315. Therefore, where in a title deed there was an exception of leases for three lives, which leases contained covenants that the tenants might renew on paying fines of 20*l.* each, the purchaser was held bound by these covenants; for, by the exception, he had implied notice of them. *Tunser v. Florence*, 1 Ch. Ca. 260. In a case which occurred shortly afterwards, a mortgage was excepted in the defendant's conveyance. This conveyance, it was held, the defendant ought to have seen, and that would have led him to the other deeds, in which, pursued from one to another, the whole case might have been discovered. *Bisco v. Banbury*, 1 Ch. Ca. 291. So in another case where a tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, it was held, that though the power was by this stipulation exceeded, yet if a life dropped during the life-time of the lessor, the purchaser having notice must specifically perform the covenant, by granting a new lease with the same provision. *Taylor v. Stibbert*, 2 Ves. jun. 437; et vide postea, 669, *in notis*.

Notice of deed, notice of its contents. Notice by exception in deed.

Excess of power binding with notice.

In the same case it was held, that general notice to a purchaser that there are leases, will amount to notice of all their contents. The same law has prevailed from the reign of Charles the Second down to the present period; see *Hall v. Smith*, 14 Ves. 426. *Finch v. Finch*, 15 ibid. 43. 350. and *Daniels v. Davison*, 16 ibid. 249. S. C. 17 ibid. 433; and in a late case a person contracting to purchase leasehold property, was held to contract with notice of the clauses contained in the lease; for the treaty of purchase being of leasehold property, the purchaser must be deemed to have general notice of the lease. *Walter v. Maunde*, 1 Jac. & Walk. 181. Similar doctrine has been advanced and acted on by Lord Manners in Ireland, who said, that notice to a purchaser of a lease necessarily implied notice of all the covenants in it, and that if a person be specifically informed that the estate is in lease, he will be bound to know all the contents of the leases,

Purchaser of leasehold property, presumed cognizant of contents of leases.

ed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

*Title under will,
is notice of lega-
cies given by it.*

Thus (d), where B. devised to J. in tail male, and if he died without issue male, to Y. in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and Y. afterwards levied a fine to the use of him and his heirs (on which was five years non-claim), and then granted a rent-charge of 100*l.* per annum to S. and mortgaged the premises to L.; the Court held the fine and non-claim was no bar to the legatees; for Y. having no title, but under the will, it was implied notice to all purchasers under him.

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*Title through
letters patent
reciting a trust,
is notice thereof.*

So (e), where an annuity was granted to A. by the crown, by patent issuable out of the Excise upon special trust, that all such of the creditors of B. as would come in *within a twelve-month*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and A. after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from B. but were in truth for A.'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration. It was held, that although all the creditors of A. did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who pur-

(d) *Drapers' Company v. Yardly*, (e) *Dunch v. Kent*, 1 Vern. 260. et al. 2 Vern. 662. 319.

and cannot take upon himself a partial knowledge. *Eyre v. Dolphin*, 2 Ball & Bea. 301.

*Notice of deed,
notice of non-
performance of
covenant con-
tained in it.*

By notice of a deed a purchaser will not only be deemed to have notice of its contents, but also of the performance or non-performance of the stipulations and agreements contained in that deed; for having notice of the covenants, he should inquire whether they have been satisfied, or remain to be executed. Thus no claim can be maintained by a husband under his marriage agreement, while the terms on his part are not fulfilled. *Mitford v. Mitford*, 9 Ves. 87. and see *Basevi v. Serra*, 14 ibid. 313. And therefore a purchaser from him of the subject which was settled on the part of the wife, with notice of the deed, will be bound by the same equity as the husband was subject to. *Harvey v. Ashley*, 2 Sch. & Lef. 328, cited.

*Notice of deed,
not notice of
fraud.*

But notice of deeds is not notice of the fraudulent intent of those deeds, other than as against the persons who are parties to the fraud. *Collett v. Ward*, 7 Vin. Abr. 123.

*Trust of at-
tendant term
not notice, ex-
cept, when.*

Neither will notice of a deed whereby a term is assigned to protect the inheritance from incumbrances generally, be notice of the existence of any incumbrances, yet, if in an assignment it be declared that the term is to attend the inheritance as limited or settled by such a deed, or to protect the uses of such a settlement, that will be notice of the deed or settlement, and consequently of all the uses declared in it; and the purchaser or mortgagee will be bound to find them out at his peril. 1 Col. Jurid. 337. and see *Willoughby v. Willoughby*, 1 T. R. 763.

chased of the assignees of A. came in under the Letters Patent, in which the trust was mentioned, and ought to have taken notice of it at their peril (g).

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it (h).

Notice to subsequent purchasers.]

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As if A. makes a conveyance to B. [reserving to himself a] power of revocation by will, and afterwards limits other uses; if B. disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation (f) (i).

Conveyance to B., with power for A. to revoke, purchaser from B. has notice of A.'s power.

But in the case of *Bovey v. Smith* (g), a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was room to presume, that other trusts were appointed. In that case, B. the mother of A. being in Holland, and having a separate estate, about forty years previous to the time of filing the bill, made her will in Dutch, and thereby devised houses to W. her husband's son by a former wife, and to other trustees, in trust for her four daughters and their children, and such of their children as should be alive at the last, and afterwards declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance, in

Exception as to dormant trusts.

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(f) *Moore v. Bennett*, 2 Ch. Ca. 245.

(g) 1 Vern. 84. 144. S.C. 2 Ch. Ca. 124.

(G) Of constructive notice by exception in deeds, see commencement of preceding note.

(H) But a person affected with notice will have the benefit of the want of notice by intermediate parties, *postea*, 645.

(I) From the report it appears that A. made a conveyance to B., with power of revocation by will, and limited other uses; and it was held, that if A. disposed of the premises to a person by will, another purchaser subsequent (i. e. under the deed) should be intended to have notice of the will, as well as of the power to revoke, for that this was notice in law on the principle, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed consunt thereof; for it is *crassa negligentia* that he sought not after it. This doctrine has been acknowledged in several cases. In *Coppin v. Fernyhough*, *postea*, 584, it was decided that a mortgagee will be bound by that which he might have known by using due diligence; and in *Pearson v. Morgan*, 2 Bro. C. C. 388, it was argued with effect, that if a party be aware of a deed it will be sufficient; whether he knows of the contents of the deed, or not, it will bind him.

Case in text explained.

1662, for a good and valuable consideration, and distributed the money, arising from the sale, equally amongst them (h). A. was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards W. the trustee, for a full consideration, purchased them back to himself and his heirs (i). Then A. having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against S. who now stood in the place of W. the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.

Title under will, is notice of its contents, and of construction of law thereon. Arg°.

One point argued was (k), that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which their trust was created, and every man that had notice of the will, must, at his peril, take notice of the operation and construction of the law upon it (κ). But the

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(h) *Bovey v. Smith*, 1 Vern. 84.
144. S. C. 2 Ch. Ca. 124.

(i) *Ibid.*
(k) *Ibid.*

Purchaser not presumed to know doubtful equities.

(K) But though every man will be presumed to be acquainted with the common law of the realm, yet an eminent judge in Chancery has in effect said that he would not presume the subject to know every minute and unsettled doctrine in equity, or bind him to take notice of an equity arising out of the mere construction of words which are uncertain. On a bill filed to alter a settlement made after marriage, pursuant to articles entered into prior to the marriage, against a purchaser for valuable consideration under the settlement, and with notice of the articles by means of their recital in the settlement, Lord Northington observed, that the argument for a construction of the articles whereby the vendor would have had a less estate than he sold to the purchaser, supposed, as against the purchaser, that the subject must know equity as well as law; a position which Lord Northington found no case to warrant, and he would not be the first to make one. A man must indeed, take notice of a deed on which an equity, supported by precedents, (the justice of which every one acknowledged) arose, as in the case of prior incumbrances; but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends upon their locality, *Cordwell v. Mackrill*, 2 Eden, 347; and this doctrine of Lord Northington's was, in a recent case, cited with approbation by Sir William Grant, M. R., who said there may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision of the court thereon. *Parker v. Brooke*, 9 Ves. 583. and see *Hardy v. Reeves*, 4 *ibid.* 466. and *Matthews v. Jones*, 2 Anstr. 506.

Whether title depending on settlement, not framed according to rules in equity, can be approved.

Whether a purchaser can be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity, is still a matter of doubt, see *Fearne's P. W.* 315. In a case in *Atkyns's Rep.* (3d vol. 293), Lord Hardwicke said, if articles on marriage, are, to settle an estate to A. for life, then to his wife for life, with remainder to the heir male of the body of A., it is taken in equity to be in strict settlement, and to confer on A. an estate for life only, and if the settlement be made after marriage, a court of equity will rectify the settlement by the articles; but this, added his Lordship, was between the parties to the articles and settlement and their representatives and mere volunteers, and had not been carried into execution against a purchaser. *Vide etiam, Powell v. Price*, 2 P. Wms. 539; and *Hart v. Middlehurst*, 3 Atk. 377. The same noble Lord in a subsequent case, (*Senhouse v. Earl*, Amb. 353.) drew a distinction

Lord Keeper said, this was an application, after one and thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and *that*, upon a supposal that B. had made no other appointment (as she had power to do by the deed), and which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between children and issue was nice, and the question was, who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore,

between ancient and modern articles of this sort, and expressed his opinion to be, that in the case of ancient articles the purchaser should not be disturbed, because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in case of notice of modern articles, he thought the court ought to carry them into execution against a purchaser. And his Lordship might, perhaps, have been induced to this latter conclusion by considering, that if the articles be recited in the settlement the purchaser will have notice of them; and then, according to the doctrine in the text, he will also be deemed to have notice of the construction of equity thereon. But we have seen that Lord Northington's opinion inclined to the side of the purchaser, and therefore nothing conclusive can be affirmed of the question. On the whole, however, it seems clear; that a court of equity will not force a purchaser to take a title depending on a settlement, not framed according to the general rules of equity; although no relief might be granted to his prejudice if he has actually purchased.

But notice of deeds, whereon arose a clear equity in favour of a judgment creditor, Lord Redesdale, in a late case, considered to be notice of that equity, notwithstanding the purchaser had not notice of the particular incumbrance. Thus A., being seised of Blackacre in fee, and of Whiteacre for life, with remainder to his first son in tail, confessed judgments, and settled Blackacre in consideration of a re-settlement, by which he acquired the fee of Whiteacre.—Whiteacre, it was held, was subject to an equity to disencumber Blackacre. And this equity, Lord Redesdale considered binding on the purchaser who had notice of the instruments; for, said his Lordship, the rule is clear, that a purchaser takes, subject to all equities to which the vendor is liable, and of which the purchaser has notice. Here the purchaser took under the settlement, without which he had no title; and taking with notice of the settlement, he had notice of a clear equity against the estate: namely, that whatever incumbrances might affect the estate of Blackacre, were to be made good out of the estate of Whiteacre; and this estate having been given as part of the consideration for the settlement of Blackacre, it was liable to that equity in the hands of the purchaser. It did not follow, that the purchaser had notice of the particular incumbrance, but he had notice that the lands of Blackacre were to be indemnified out of the lands of Whiteacre, against any incumbrance which might affect the same lands. The equity was such, that every purchaser under the settlement must be deemed to have notice of it; for it was a clear rule, that a man could not claim under a deed and avoid the deed, he must submit to the whole, and the purchaser had notice of every thing of which the vendor had notice, so far as concerned that deed. *Hamilton v. Royce*, 2 Sch. & Lef. 315. But Mr. Sugden apprehends, with good reason, that this case carries the rule much further than is warranted by either principle or authority, since it was not a very obvious equity, that Whiteacre should disencumber Blackacre of the judgment debts. See ante, p. 555, of this edit. note (Y), for the general grounds whereon the purchaser of Whiteacre was fixed with notice.

Contra, of plain equities.

though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed (L).

But notice of will is not notice of its contents, if purchase be of an executor.

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So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor (I); for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose (M).

Same.

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Thus, where M. (m), having a mortgage of 3500*l.* made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son I. M. and another person, executors, and died, leaving his widow and five children. After payment of all M.'s debts, a large surplus remained to be divided. I. M. having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of E. procured a deed to be

(I) 3 Atk. 236.

(m) *Mead v. Ld. Orrery*, 3 Atk. 236. July 19th, 1745. Et vide *Ewer v. Corbett*, 2 P. Wms. 148. *Burting v. Stoward*, *ibid.* 150. [Et vide on same

subject, *Hardwicke v. Mynd*, 1 Anstr. 109, and *Smith v. Atherly*, 2 Freem. 136, where a purchaser having notice of a will, was decreed to pay the legacies given by it.—Ed.]

Case in text over-ruled, sed secus, of doctrine.

(L) This decree of dismissal was reversed in Dom. Proc. 4th Mar. 1692, xv. Lor. Jo. 275-6. The precise points inducing the reversal do not appear. The principle stated in the margin of the text, seems to be in unison with the prior determinations; and therefore we may conclude, that the judgment of reversal turned upon other points. Lord Redesdale, however, as to those points, treats the case as an existing authority, in *Kennedy v. Daly*, 1 Sch. & Lef. 379. But it is probable that his Lordship was not aware of the reversal.

Executor's power.

(M) There would, indeed, be great inconvenience in obliging a fair purchaser not colluding with the executor, to take notice of the trusts of the will, when both the law and the testator have concurred in placing the sole right of absolute disposition in such executor. The extent of the executor's power to mortgage or sell the goods and chattels, and terms for years of his testator, has been treated of in a former page and note. See *antea*, 101 to 105, of this edition; and see also the two succeeding notes (N) and (O).

made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.* and that the same was the proper money of I. M. and assigning the mortgage, and all due thereon, to B. his heirs and assigns, with a proviso to be void, if I. M. faithfully accounted with B. for what he should receive from the estate of E. I. M. afterwards died intestate, without accounting with B. and greatly indebted to the estate of E. A bill was then filed by the plaintiffs, two of the children of M. against the defendants, the representatives of E. to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, whether the plaintiffs, as residuary legatees of M. were entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of E. were entitled to retain the assignment? And this turned upon the point, whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the Court held, the bare point of notice of the will, in this case, was not sufficient (N). [578]

So (n), where an executor assigned over a mortgage term of his testator to A. as a satisfaction of a debt due to A. from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the Court held the alienation to be good (o). *Testator's term assigned to satisfy executor's debt, not of itself notice that term was assets.*

(n) *Nugent v. Gifford*, 1 Atk. 463. *Stonard*, 2 P. Wms. 130. [Barnard. 1738. S. C. 2 Ves. 269. *Ewer v.* 78. 2 Atk. 41. 3 Atk. 235.—Ed.]
Corbett, 2 P. Wms. 149. *Burting v.*

(N) This and the next case, are said to depend almost entirely on particular circumstances. See *Taner v. Ivie*, 2 Ves. 469. The broad principles contained in *Mead v. Orrery*, were afterwards disapproved by Lord Kenyon, in *Bonny v. Ridgard*, 1 Cox, 145; S. C. 2 Bro. C. C. 433. 4 ibid. 130. 136. 7 Ves. 167, and 17 ibid. 165, cited; and in a prior case, *Crane v. Drake*, 2 Vern. 616, relief had actually been granted to a creditor against a purchaser, of part of the testator's assets from an executor, the purchaser having allowed the executor's private debt out of the purchase-money, and having had express notice that the creditor's debt was unpaid, than which, Lord Alvanley said, there could not be a stronger instance of a *devastavit*. *Andrew v. Wrigley*, 4 Bro. C. C. 137. See also the next note.

(O) It was, indeed, held by Lord Mansfield, in one case, (*Whale v. Booth*, 4 T. R. 625. n. a), that such was the power of an executor, that although it was apparent on the face of the transaction, that he was about to apply the assets to a purpose foreign to the will, yet a person with that knowledge was justified in dealing with him, upon the supposition that all the debts were paid, or that the testator's estate was, or might be indebted to the executor to that amount. In the case before him, his Lordship accordingly held, that where a creditor under a writ of *fi. fa.*, takes in execution *Relief against purchase from executor with notice of debts unpaid.*
Bona testatoris, not liable to fi. fa. against executor.

But purchase of executor with notice of unsatisfied debt, void against creditors (nn).

But if such purchaser, from an executor, hath *express notice* of a debt due from the testator still unsatisfied, and there be a contrivance between him and the executor to defeat a just debt, such a transaction will be void against creditors, and the assignee will be held liable.

Thus, where H. (o), being indebted to C. on bond, died pos-

(nn) [Et vide S. L. Pagitt v. Hoskins, Gilb. Eq. Ca. 113.—Ed.]

(o) *Crane v. Drake*, 2 Vern. 616. Note, Lord Hardwicke admitted the

principle of this case, but doubted whether the facts warranted the application of it. Vide 2 Ves. 469. (P)

bona propria and *bona testatoris* vested in his debtor, knowing them to be such, the execution will be valid, on the ground that the executor joined in the bill of sale, which his Lordship considered tantamount to a conveyance. *Whale v. Booth*, ubi supra. The full extent of this doctrine, Lord Eldon has expressed himself not prepared to follow. *M'Leod v. Drummond*, 14 Ves. 353. S. C. 17 ibid. 170. And in a case decided subsequently to that of *Whale v. Booth*, Lord Kenyon, C. J., and Ashurst and Grose, Jrs., against Buller, J., decided that *bona testatoris* could not be taken in execution under a *fi. fa.*, in satisfaction of the executor's private debt. *Farr v. Newman*, 4 T. R. 621.

Nugent v. Gifford, re-stated.

The case of *Nugent v. Gifford* is very shortly stated in 1 Atk. 463, from which the text is taken. It appears from the Register's Book 1738, B. 117, see also 17 Ves. 163, that it was not a specific devise of a term, but that the term formed part of the general assets of the testator. The term was vested in trustees for Sir Richard Billing, who had, by his will, given several specific legacies, and made his natural son executor and residuary legatee. Two years after Sir Richard's death, the son became indebted to one of the trustees of the term, and assigned the same to him as a security for the debt. And the Master of the Rolls, in the case of *Andrew v. Wrigley*, 4 Bro. C. C. 136, said, he could lawfully do so, inasmuch as he was executor; and his Honour admitted, that it was not incumbent on a purchaser from an executor and residuary legatee, to enquire whether the debts were paid; in fact, that mere notice of the will did not oblige the purchaser to enquire after the trusts of the will. But it must be observed, that no case has decided that an executor can sell or mortgage a term specifically devised, for his own debt. Indeed, it appears to have been expressly adjudged, in the case of *Scott v. Tyler*, 2 Dick. 724, that if an executor pledge bonds, specifically bequeathed, for a debt contracted by himself on his own account, after the testator's death, the pawnees will be ordered to deliver them up for the benefit of the specific legatee; although three or four years might have elapsed between the death of the testator and the mortgage transaction.

Result of cases.

The cases on this head have already been investigated, see antea, 101 to 105, of this edit. The result of them appears to be, that if a purchaser or mortgagee advances money to an executor, (even though the executor be also residuary legatee,) for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk, and is liable to a suit for relief on a bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if such legatee pursue his remedy within a reasonable time. If the executor be also specific legatee, a mortgage from him of the specific legacy for satisfaction of his private debt will be good, unless it can be shewn that the mortgagee knew there were debts unpaid. *Taylor v. Hawkins*, 8 Ves. 209. See also, antea, 101 to 105, of this edition.

Author's note corrected.

(P) This is not exactly correct. Lord Hardwicke said, that his determination in *Nugent v. Gifford* was grounded on a case in Lord Cowper's time, [*Crane v. Drake*]; but he was not satisfied in *Nugent v. Gifford*, that there was sufficient evidence to come up to the ground of Lord Cowper's determination, the principle of that decree turning on the contrivance which appeared between the executor and assignee of the mortgage to make a *decastavit*. His Lordship therefore admitted the principle

seised of a great personal estate, and made W. executor and devisee, who wasted the estate; D. *having notice of C.'s debt*, bought a leasehold estate of W. by discounting 200*l.* due from H., 550*l.* due from W., and by payment of 150*l.* in money: on a bill filed by C. to have satisfaction for his debt out of the leasehold estate, being part of H.'s assets, the question was, whether this was a good sale to bind a creditor? And it was held it was not, for D. was a party consenting to, and contriving, a *devastavit*.

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So (p), where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, whether such creditor should retain it by way of security for his own debt, as well as for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that a purchaser or mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far, as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would be the consequence if this was allowed. Such creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the court would not suffer the trustee to do, considering the giving preference to one creditor, as a fraud, which the court would not allow.

No preference to creditor becoming mortgagee with notice of trust.

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If a deed, by which a prior charge is made upon an estate, be delivered, among other papers relating to the title thereof, to an

Settlement necessary to vendor's title, purchaser deemed to have notice of it.

(p) *Ithell v. Beane*, 1 Ves. 215. [S. C. 1 Dick. 132, et antea, 223, of this edition.—Ed.]

of *Crane v. Drake*, but doubted whether the facts in *Nugent v. Gifford* came up to it.—It is, however, worthy of observation, that as to the principle of fraud and contrivance between the executor and mortgagee, which the court is said to have gone upon in the case of *Crane v. Drake*, no mention of such fraud or collusion is made in the statement of the case in the Register Book, nor is it even charged by the plaintiff in his bill, Reg. Lib. 1707, A. fo. 456. The case, as Lord Hardwicke admits in another place, (*Jacob v. Harwood*, 3 Ves. 269.), is shortly reported in Vernon, and grounded on notice to the purchaser of the particular debt due before his purchase. The law, however, as it now stands, is understood to be different. There must be fraud and collusion, either express or implied, between the mortgagee and executor, over and above actual notice of an unsatisfied debt due, and then, upon the known principle of the court, the purchaser or mortgagee will be bound. See *Whale v. Booth*, ubi supra, p. 569, of this edition, n. (O). 2 Dick. 725, and 1 Burr. 475.

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A. purchases with notice of settlement, whereby vendor was tenant for life, and sells to B. without notice, B. shall hold; but A. shall account for purchase-money with interest (q).

intended purchaser, and it be proved that a settlement among those writings is necessary to the vendor's title, the vendee will be deemed to have notice of it, and be accountable to the claimants under the settlement for the money he receives on a re-sale (q).

Thus, where the plaintiff's father and mother sold an estate to C. and his heirs, which, pursuant to an agreement made on their marriage (r), had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male; and the conveyance was made by deed and fine. C. upon his purchase, took in a mortgage-term, which was prior to the settlement, entered and afterwards sold the estate to H. and I. It appearing, by the proofs in the cause, that C. the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the court decreed, that C. should account for the consideration money, for which he sold the estate, with interest from the decease of the plaintiff's father and mother (r) thereout, discounting what was due on the mortgage made prior to the settlement (s).

Purchaser having notice of settlement, must enquire whether it be voluntary or made in pursuance of articles.

And if it doth not appear, upon the face of such settlement, whether it be voluntary, or on articles before marriage (s), and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser,

Old writings in box, no notice of their contents.

(q) Vide 1 Ves. 435. Letters and writings were in the possession of a party, but in a box supposed to contain nothing but old writings.—Such party held not to have notice of the

contents on application for a bill of review, founded on these letters. [Et vide postea, 588, n. (d).—Ed.]

(r) *Ferrers v. Cherry*, 2 Vern. 344.
(s) *Ibid.*

Purchaser with notice from one without notice, sheltered under first purchase.

(Q) So in *Mertins v. Jolliffe*, Amb. 313, it was said, that if one affected with notice conveys to another without notice, the assignee, in case he has the legal estate, shall protect himself against prior incumbrances: so *vice versa*, if an incumbrancer without notice assigns to one who has notice, yet the assignee may protect himself; and the reason is, to prevent a stagnation of property. And in *Lowther v. Carlton*, 2 Atk. 242, S. C. 2 Eq. Ca. Abr. 685, pl. 10. Ca. Temp. Talb. 187. Barnard. 358; it was held, that a purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchase, vide etiam Toth. 284. These cases must be considered as over-ruling *Phillips v. Redhill*, 2 Vern. 160, cited. In that case, a tenant for life sold as a tenant in fee, and the very settlement at the time of the purchase was delivered to the purchaser himself; yet the court would not affect the purchaser with the presumptive notice, but dismissed the bill.

Phillips v. Redhill, over-ruled.

(K) Mother only. Reg. lib. 1699, A. fol. 553.

(S) And paying the plaintiff his costs, including what costs he might have paid two other defendants. Reg. lib. 1699, A. fol. 553.

having notice of the deed, must, at his peril, purchase, and be bound by the effect of it (τ).

But, in the last case, the bill was dismissed as to H. and I., who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there being no foundation to presume knowledge of the settlement, *C. being able to make a good title without it.*

The adherence to this rule of equity (υ) is so strict, that, although there be no positive notice contained in a purchase deed, yet if there be words therein, from which the existence of a prior incumbrance must necessarily be implied, it will be sufficient to charge a purchaser. Thus, where a creditor by judgment, in 1698, for 600*l.* came to an account with the conusor in the year 1707, and settled the remainder due upon the judgment at 420*l.* and took a mortgage in fee for that sum, as a collateral security to the judgment (τ); and one S., an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90*l.* of the consideration of the assignment, was then the full worth of the estate.* S. was likewise in possession of another mortgage made in 1688, upon the same estate, as was subject to the judgment in 1698, and the mortgage in 1707. It was resolved S. should not be allowed to tack the two mortgages together, so as to defeat the intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698,

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Contra, if he can deduce title without it.

Notice presumed from words implying existence of prior mortgage.

[583]

(τ) *Morrett v. Paske*, 2 Atk. 54. Vide 1 Atk. 490, 491.

(T) And the reason is, that the titles of other men ought not to be shaken by creating a title, vested in a third person, through his own folly. The settlement after marriage did not recite the previous agreement, but it was held, that the party ought to have gone to the wife's relations. See *Hiera y. Mill*, 13 Ves. 121. In *Senhouse v. Earl*, Amb. 289, Lord Hardwicke is reported to have said, "As to the case of *Ferrers v. Cherry*, the reporter has mistaken the state of the case. I am inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not, I deny the authority of that case." In reference to the uncertainty of the settlement whether it was voluntary or not, it is stated in Reg. Lib. 1699, A. fol. 553, that the settlement was executed after marriage in pursuance of articles made and executed before marriage, clearly shewing that the settlement was not voluntary; and that his Lordship was mistaken in this point. His Lordship also appears to have recalled his denial of the case, by acknowledging it in *Mertins v. Jolliffe*, Amb. 311, where he must be understood to have said, that although the case of *Ferrers v. Cherry* went a great way, yet it was implied notice. It is also within the spirit and meaning of the rule for which the learned author adduced it as an example, namely, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to be acquainted with that fact. Lord Erskine too cites it as an existing authority in *Hiera v. Mill*, ubi supra.

Case in text denied to be law. Sed secus nunc.

(U) That notice of a deed leading to a fact, is notice of that fact.

recited, being in the hands of a family, is not a sufficient evidence of notice to affect them, if the claim under a settlement; which might be made by an *apparent owner* without looking into the deeds; for in such case something farther must be shewn. So, where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and on her death, to the sons of the marriage (x); under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice. Notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from the deeds being in the hands of the family, which was held not sufficient to affect them with notice; because such settlement might have been made by an *apparent owner* without the deeds having been looked into.

Whatever puts
a party on en-
quiry, is good
notice in equity
(Y).

And whatever is sufficient to put the party charged with

(x) *Whitfield v. Fausset*, 1 Ves. 347.

Notice of ten-
ant's posses-
sion is notice of
his interest.

(Y) This is the general rule. The preceding note but one will furnish an apt example of the manner of its application. It was acknowledged in *Daniels v. Davison*, 16 Ves. 249. S. C. 17 ib. 433, and has been uniformly acted on as the very basis of constructive notice. In *Douglas v. Whitrong*, cited 16 Ves. 254, it was settled, that if a person, purchasing where there is a tenant, neglects to enquire into the nature of the estate and title of such tenant, he must take subject to such rights as the tenant may have. The same law was acknowledged by Lord Redesdale, in the House of Lords, in *Moore v. Blake*, 4 Dow. P. Rep. 245. On this principle it was determined in *Daniels v. Davison*, ubi supra, that the possession of the tenant will be notice to a purchaser of the actual interest he may have either as tenant or otherwise; and therefore where there was a lessee, who, by his original agreement, had an option of purchasing the estate at certain periods; and the tenant, before his death, declared his intention of purchasing the estate, he was held to be the owner of the property *ab initio* from the date of the lease for the benefit of his heir at law, the price to be paid by his executor; and specific performance was consequently decreed in favour of the tenant against the seller and second purchaser, who knew of the possession of such tenant,—the seller and second purchaser being left to settle their rights between themselves. 17 Ves. 433.

Whether that
interest arise
under an agree-
ment to pur-
chase.

Or under a lease
or tenancy
from year to
year.

In *Taylor v. Stibbert*, 2 Ves. jun. 440, Lord Rosslyn states the rule thus:—
“I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to enquire into the estates those tenants have. It has been determined, that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking for granted, it was only from year to year, was bound by the lease that tenant had; which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon enquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; and that there were interests, as to the extent and terms of which it was his duty to inquire.” So, in a later case it was held, that the possession of a tenant will be notice to a purchaser of the whole actual interest he may have in the estate; and, consequently, of a right to the

Or under an
agreement pos-
terior to his
lease.

notice upon an enquiry, is good notice in equity (y): thus, where infants, entitled to an estate, found a person in possession then,

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(y) *Smith v. Low*, 1 Atk. 489.

timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded. *Allen v. Anthony*, 1 Meriv. 282.

The conclusion from these cases is, that a purchaser cannot be advised to complete a contract for an estate not in the seller's own occupation, without a communication with the tenants, to ascertain what their interests really are.

Practien:

But although notice of a tenancy, will be constructive notice of the title of the tenant, yet it seems that if the tenant, in conjunction with his landlord, create any equitable claim on the legal estate of the lease in favour of a third person, the purchaser will not be bound to notice it from the mere circumstance of the tenant's possession. The case supporting this position is that of *Crofton v. Ormsby*, 2 Sch. & Lef. 583, before Lord Redesdale, which requires to be shortly stated to enable the reader to apply his Lordship's observations to the point proposed. One Crofton, a lessee for lives, on his marriage, procured a promise from his landlord (by letter) to change the then only existing life of his lease for the life of his intended wife. A settlement was then made, whereby this equitable interest was settled on his wife for her life provided she survived him. The marriage was had without any actual alteration having taken place; and afterwards the landlord dying, his property was sold, and the premises comprised in the lease purchased by the defendant, with divers other leases. In the rent-roll delivered to the defendant, it was stated in a column opposite to the name of the farm in question, that the legal subsisting lease was made in 1734, for three lives, of which, one only, A. was in existence, and in another column of observations these words were added, "The present Earl of Arran (the landlord) exchanged the life of A. for the life of E. C. wife to said Crofton (the lessee) on the 8th of August, 1782." On this evidence it was decreed, that the purchaser had sufficient notice of the promise by the Earl of Arran, to change the lives as above stated; and he was consequently decreed to perform the agreement in specie. In the course of his judgment, Lord Redesdale observed:—"If one purchases, knowing that another person is in possession, he must know that the person so in possession has some interest, and he is bound to enquire what is his interest: if upon such enquiry, he is deceived (as, for instance, if in the present case the lease of 1734, had been produced to the purchaser, as that under which the lessee held), I do not think the purchaser would be bound by any equitable contract, unless the terms of the actual conveyance had qualified that; and the reason is, that the ordinary means whereby the term of an estate is ascertained, is by production of the counterpart of the tenant's leases, and here the counterpart of the leases would have warranted the allegation, and it would be too much to expect the purchaser to go to enquire of each of the tenants. Then, it is said, there were laches on the part of Crofton, and unquestionably to a certain extent there were. If it is to be said, that it is laches to rest upon an equitable agreement, this is laches, but still this would not affect Mrs. Crofton; for I must consider Lord Arran as a party to the settlement, because the intention authorized Mr. Crofton to make the settlement. But what is the laches? Is it like the laches in *Wingfield v. Whaley*, 2 Bro. P. C. 447. *Milward v. Earl Thanet*, 5 Ves. 720, n, or the other cases? No: these were cases of a different description. The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for forty or fifty years, without clothing it with the legal estate. I conceive, therefore, that possession having gone with the contract, there is no room for the objection."

Tenant's possession not notice of equitable contract, if not produced on enquiry.

No laches in neglecting to obtain legal title.

Notice of a tenancy will not affect a purchaser with constructive notice of the lessor's title. Thus, if trustees under a charity make an improvident lease, a purchaser from the lessee, though he must be understood at

Notice of tenancy not notice of lessor's title.

and received rent of him for ten years after they came of age; that was held to be a sufficient notice of a lease made by their

least to know that the lessors were trustees for a charity, yet the court will not go the length to presume that he knew the lease was bad; that depending on a number of circumstances *dehors* the lease, Lord Eldon said, though the purchaser of a lease had never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length, that the purchaser was to take notice of all those circumstance, under which the lessor derived that title. *Attorney-General v. Backhouse*, 17 Ves. 293. That an invalid lease at law can be made good in equity against a purchaser, by notice to him of the existence of such intended lease, is certainly not a proposition which Lord Eldon meant to be deduced from his observations, for such a lease might easily be set aside at law by action of ejectment against the wrongful tenant in possession. *Doe v. Luffman*, 4 East, 221. His Lordship is not speaking of a purchaser of the inheritance with notice of a lease, but of an assignment from the lessee himself, who gives notice to the purchaser that his lessors are trustees under a charity.

Same.

As another instance of the lastly-mentioned rule, that notice of a tenancy will not affect a purchaser with constructive notice of the lessor's title, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate, sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession. *Sug. Ven. & Pur.* 651, 5th ed.

Notice inferred from legal estate and deeds outstanding.

On the principle that whatever puts a party on enquiry, is good notice in equity, it is further observable, that if a person be apprised that the legal estate is in a third person at the time he purchases, he will be bound to take notice of the trusts with which that legal estate is clothed. *Anon.* 2 Freem. 137, pl. 171. So notice that the title deeds are in another man's possession, may, under strong circumstances, be held to be notice of an equitable claim which that person has on the estate, and as a security for which he holds the deeds. *Hiern v. Mill*, 13 Ves. 114. As to equitable claims, where one was seised of an estate, subject to several equitable incumbrances, and sold it to a purchaser, conveying the legal estate to him free from incumbrances, except some of the equitable incumbrances which were later in date than the others, the purchaser, who had no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to the other creditors. *Ingram v. Pelham*, Amb. 153. And cases have occurred, in reference to the covenant against incumbrances, where it has been doubted whether such a covenant would extend to protect a purchaser, against incumbrances, of which he had express notice; and see *Ogilvie v. Foljambe*, 3 Meriv. 65.

Inadequacy of consideration notice, when.

The inadequacy of the purchase-money, in comparison with the real value of the estate, does also, it is said, furnish ground to presume that the purchaser is aware that he is contracting for an estate which is subject to some incumbrance; and if an incumbrance exists, he will be bound by it accordingly. *Stockdale v. South Sea Co.* Barn. C. C. 367; et vide antea, 574, of this edit. in the text. A purchaser, with notice, is bound in all respects as the vendor, 2 Ves. jun. 437; and *Coppin v. Fernyhough*, 2 Bro. C. C. 291, shews, that a mortgagee with notice of an equitable claim, cannot protect himself as a purchaser, or be distinguished from the mortgagor.

Mortgagee with notice in same situation as mortgagor.

Notice arising from possession, and non-possession of vendor.

A purchaser will not be affected by the vendor's non-possession for many years; for whether in or out of possession, his title will remain the same, unless it be so long neglected as to be barred by the statute of Limitations. Possession is not even *prima facie* evidence of title, because it may either be by sufferance or trespass. A purchaser, therefore, is bound to enquire into a title, though the party of whom he purchases be in actual possession, and if, upon being asked for the deeds, the vendor acknowledges that he has them not, the purchaser must make further enquiry. See *Oswith v. Plumer*, 3 Bac. Abr. 641, antea, 538, and *Hiern v. Mill*, 13 Ves. 122.

Covenant that minor shall execute when of

Where a covenant was introduced into a settlement, that one of the parties, who, at the time of the execution of the settlement, was a minor, should convey when of age, it was argued, that such covenant imported

guardians, and a ground from whence to conclude that they had ratified it; for, finding a person upon their estate, was sufficient to put them upon enquiry.

So, where a defendant claims under a conveyance made by a remainder-man (z), where there is an estate tail prior to the estate of him under whom he purchased, it is incumbent on him to see if that estate be spent; for, if it be not, he will be considered as having notice thereof.

And it will not be a sufficient denial for the purchaser to plead, that at the time of the purchase, the vendor made affidavit that tenant in tail was dead without issue, and *therefore* that

Incumbent on purchaser of remainder-man to see that prior entail is spent.

Notice denied must be of plaintiff's title, not of knowledge of person to claim under it.

(z) *Kelsal v. Bennett*, 1 Atk. 522.

notice that the minor had an interest in the estate, and that the parties should have inquired what that interest was, which enquiry would have led them to a knowledge of the previous articles; in pursuance of which the settlement was made, which articles would have disclosed to them the incumbrancer's title. *This*, Lord Northington said, might have had some colour, if the minor had been of maturity; but it was a covenant necessary to make him a party to the settlement, therefore his Lordship thought that circumstance did not prove notice. *Howarth v. Deem*, 1 Eden, 355.

age, not notice that he has an interest.

In a recent case, notice of the plaintiff's title was attempted to be proved on the defendants by certain collateral matters, from which it was contended a knowledge of it might have been derived. One C. had effected an insurance of the chapel and other buildings in dispute, which purported to be made in the name of himself, "and the other proprietors." The policy was assigned to the defendant's trustee, and was mentioned in an assignment of the equity of redemption to one Goodacre and Co. These parties, it was said, must be presumed to have inspected the policy. If they did, they must have seen that there were "other proprietors;" and by proper enquiries they might have learned that the plaintiffs were those other proprietors. But Sir Wm. Grant said, he had no conception that this could be deemed that clear proof of actual notice, which the cases professed to require: especially as there was in the answers an express denial of any notice whatever. But as against Goodacre and Co. it was said, that there was farther evidence of notice, which was received, not before they took and registered the assignment, but before they had advanced the whole money they had agreed to lend. It was indeed contended, that for the subsequent advances they were not entitled to the benefit of their security as against the plaintiffs. This was founded on a passage in the answer of a Mr. Buzzard, one of the partners in the house of Goodacre and Co., who said, that in September, 1812, he had received an instrument, from which instrument notice was inferred. "Now, continued Sir William Grant, here is a paper, transmitted to Mr. Buzzard, not by way of claim or notice to him from any of the plaintiffs, not for his own information on any subject, not as a ground on which he was to do any act, but merely for the purpose of communication to a person, who was expected to become a subscriber to the chapel; and to whom it was thought expedient to shew the nature of the security, which the subscribers were to have for their money. There was nothing in the circumstances or the purpose of the communication, that was likely to induce him, still less that made it a duty incumbent upon him to pay any particular or minute attention to the contents of the paper; and he swore that he did not pay any attention to them;" this, therefore, Sir Wm. Grant held to be no proof of notice whatever. *Wyatt v. Barwell*, 19 Ves. 440.

Notice not implied against a person from instruments leading to facts, if not his duty to enquire after them.

Lastly, note, that reasonable notice is a question for a jury. *Peacock v. Peacock*, 16 Ves. 59. And for a further distinction on this rule, see ante, p. 554, of this edition, note (Y).

Notice, question for jury.

he is a purchaser without notice; for, this is a denial only of the knowledge of there being a tenant *in esse*, not of knowledge of his title, which a purchaser is bound to take notice of (zz).

Title deduced by recital not notice to subsequent purchaser that his vendor's purchase money is unpaid.

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Person having a paper which is constructive notice, must say when he came by it.

Party may shew that his attorney misinformed him of the effect of a deed.

But if, from recital, a title to lands be deduced by the first vendor, that will not be sufficient, if such estate be not paid for, to affect a subsequent purchaser for a valuable consideration with notice thereof (a); for that does not shew that it was not paid for, or lead to an enquiry whether it was paid for or not (z).

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there (b); for if a person admits, or a deed be proved to be in his custody, whether as representative of another or otherwise, it will be incumbent upon him to shew when it came there, for it is impossible for the other side to shew it.

And the fact of presumptive notice, founded upon the party having had a deed, whereby a title in another, elder than his own, is created, in his possession, may be controled, by shewing that although the party had notice of the deed, yet he was not aware of its effect, but was induced, upon investigation of lawyers, to draw a different conclusion on the effect of the instrument from that which in reality it produced (A). Thus, where tenant

(zz) *Kelsal v. Bennett*, 1 Atk. 522.

(b) 2 Ves. 486. [Et vide ib. 392.

(a) Bro. C. C. 302. per Com. [See —Ed.]
infra, 642.—Ed.]

Purchase-money unpaid, not to be inferred by recital of title.

(Z) The brevity of this paragraph destroys its perspicuity. Lord Loughborough, Com. in *Cator v. Bolingbroke*, 1 Bro. C. C. 302, observed, that the principle, in case of purchase-money remaining unpaid, was the same as in the case of an exchange; the estate remained subject to the vendor's right to his money against the heir, if the purchaser were dead, or against a third person to whom such purchaser had made a legal conveyance: but if that person had paid the value of the estate, it became a question whether it was with or without notice of the first vendor's claim; and if, by recital, the title were deduced from the first vendor, still that would not be sufficient to affect the second purchaser, for that did not shew that the estate was not paid for. The cause was afterwards re-heard before Lord Thurlow, who affirmed the decree, observing, that the Lords Commissioners did not say the money might be pursued;—if they had, his Lordship thought he should have differed from them. 2 Bro. C. C. 289. As to the vendor's taking a security for the purchase-money remaining unpaid, see *Nairn v. Prouse*, 6 Ves. 752.

Doctrine of text questioned.

(A) This is a very questionable position, and not at all warranted by the case cited in support of it. To say that a party who has notice of a deed may shew that he is not aware of its effect, is in fact to affirm that notice of a deed is not notice of its contents, which is contrary to rules previously adduced. The case cited is considered in the next note as over-ruled.

for life, remainder to his first son, mortgaged for 1500*l.* (c) and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding; being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money, yet the mortgagee having had no notice thereof, and having got the deed of settlement, the court would not relieve against him by compelling him to produce it (B).

Notice to a man's scrivener, attorney, agent or counsel, is sufficient notice to the party himself (d) (c).

And therefore, where M. suffered a recovery of an estate in A., and then settled all his lands in A. upon his family (e); afterwards a tenement in A., of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then M. mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee

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Mortgagee obtaining deed of settlement from tenant for life (his mortgagor) protected.

Notice to agent binding on principal.

Notice to agent to take care, enough to make principal enquire into title, and he cannot protect himself by legal estate.

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(c) *Brampton v. Barker*, 2 Vern. 159, cited 1 Eq. Ca. Abr. 333, pl. 3, and postea, 666.

(d) *Merry v. Abney*, 1 Ch. Ca. 38. 1 Ves. 69. 2 ibid. 477. 3 Ch. Ca. 110. *Ashley v. Baitie*, 2 Ves. 368. *Hothwell v. Abney*, Nels. Ch. Rep. 59, et vide *Bishop of Winchester v. Fournier*. 2 Ves. 445.—Note, Lord Hardwicke

said, it would be too much to affect a party with notice, from the circumstance of the attorney having overlooked a deed, intermixed with a great number of old family deeds, 1 Ves. 435. N. B. The question was to a bill of review. [See antea, 580, n. (q).—Ed.]

(e) *Maddox v. Maddox*, 1 Ves. 61.

No notice of deed overlooked.

(B) It is apprehended that a court of equity would not now assist a mortgagee in thus uniting with the tenant for life in destroying or encumbering contingent remainders. As establishing a general principle, this case of *Brampton v. Barker* must be considered as over-ruled by that of *Kelcal v. Bennett*, cited antea, 586, where A. devised the estate in question to B. in tail, with remainder to C. in fee; and the bill was brought by the heir of the body of B. for deeds and writings and possession. The defendant's plea was, that he was a purchaser for valuable consideration from C., and had no notice of the plaintiff's title; but this plea was over-ruled, on the ground, that where a defendant claims under a conveyance, in which there is an estate tail prior to the estate under which he purchases, it is incumbent on him to see if that estate is spent. In *Brampton v. Barker* the mortgage deed recited the settlement, in which it appeared that the mortgagor was merely tenant for life, with contingent remainder to his son. It was therefore imperative on the mortgagee to have seen, that the contingent remainder was actually destroyed, and the estate for life merged in the reversion in fee, and that the reversion in fee was vested in the *quondam* tenant for life, before he advanced his money. As against the mortgagor, the mortgagee might perhaps have had remedy over. It was a fraud in him to conceal the circumstance of his having a son born five days previously to the mortgage; for he thereby enticed the mortgagee into a bargain, which, if he had been informed of the actual state of the facts, he would certainly have declined. Mr. Sugden also considers the case of *Brampton v. Barker* as over-ruled, see V. & P. p. 665, 5th edition.

Brampton v. Barker considered over-ruled.

(C) The later cases on this head have, for the most part, been collected in a former note, see antea, 567, n. (Y).

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applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to B., who had advanced the money to pay off the former mortgage. It was sworn, that B.'s agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was (*f*), whether the last mortgagee had not notice of the youngest son's title? And the court held, here was such evidence of general notice, either to the party himself, or to his agent, to take care, as made it necessary for him to enquire into the title, which not having done, he must take the consequence (*n*).

Third mortgagee buying first mortgage, not preferred to second, the three securities being prepared by scriveners who were partners.

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So, where E. mortgaged his manor of B. to M., and his heirs, for securing 3000*l.* (*g*); afterwards G., the father of the plaintiff B., lent E. 2800*l.* and, by deed, reciting M.'s mortgage, he declared, that after the 3000*l.* and interest paid, the estate should stand charged, and be a security for G.'s money. M. was no party to this deed. Afterwards H., one of the defendants, lent E. 400*l.* and obtained a deed from E. and M., that after M. was paid, the estate should, in the next place, stand charged with the 400*l.* and in like manner for C., and several other defendants. All the securities were transacted at the shop of W. and Y., scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several

(*f*) 2 Ves. 485.(*g*) *Brotherton v. Hatt*, 2 Vern. 574.

Mortgagee bound by will, his attorney having recited it in mortgage.

(D) The same principle seems to have been acted on in *Newstead v. Searles*, 1 Atk. 267, where upon a mortgage to one Pindar, by the contrivance of some country attorney, Elizabeth Searles and her husband levied a fine, and in the deed to lead the uses there was a complete recital of the will under which the wife claimed, and of her marriage settlement, in so ample a manner, that the will and settlement must necessarily have been laid before the attorney; and it was held, that the mortgagee had consequently full notice of it through his agent,

lenders. The question was whether B. should be paid next after M., or whether H. and the others should be preferred, because they had got a declaration both from E. and M., who, by that means, became a trustee for them, after his own money paid? And it was decreed, that B. should be paid next to M., and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

And although a country attorney acts by an agent in causes in London, yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him will be constructive notice to them (*h*).

Notice to attorney's agent in London notice to principal.

And the law will be the same, though one person be agent for both parties, nor is it material, on whose recommendation or advice the agent was employed (*i*). For, where a woman pleaded that the agent, who made her marriage settlement, was not employed for her but as an attorney for her intended husband, admitting that he might prepare the articles, she having a confidence in him from her husband's recommendation; so that her general denial was to be taken with this admission, which left it open to the proof of notice to her agent, although personal notice was denied; it was objected, that notice to her husband's attorney or agent would not affect her; but it was held, that she had sufficiently admitted that he was agent or attorney for her, by her consenting to his preparing articles, from a confidence in her husband; and that it was no matter what ground she went upon, or upon whose recommendation or advice, it being the same thing to the plaintiffs; for it would be very inconvenient and mischievous to take into consideration from whence an agency arose. Nor was it material, that the husband also employed him, there being several cases where, in marriage settlements, the same counsel or attorney was employed on both sides, who would be both affected with notice to him, it being the same to a person having an equity.

If agent be employed on both sides, both parties affected with notice to him.

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Not material on whose advice employed.

The same principle was laid down by Lord Northington in the case of *Sheldon v. Cor* and others.

Nor his acting in different capacities, nor his being owner of estate.

In this case A. and B. were empowered by act of parliament, to purchase estates in a certain district, to enable them to build

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(*h*) 3 Atk. 37.

(*i*) *Le Neve v. Le Neve*, 1 Ves. 64. [See Amb. 627, where this is said to have been a case of fraud, but that,

it is presumed, makes no material difference to the point in the text.—*Ed.*]

a square (k), C. (who was a barrister at law, and who appeared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed \$5000. of D., and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: C. afterwards built several houses, some of which were erected upon the ground on which D. had his security, and then C. granted a lease of these houses to H., reserving a ground rent; which was done for the purpose of establishing a rent; and H. declared himself in writing to be only a trustee for C. Afterwards H. assigned some of the houses in D.'s security to M., for securing a sum of money by him lent, and then he assigned all the houses to E. likewise, for securing a farther loan. Neither M. nor E. had actual personal notice of the mortgage to D., nor of each other's mortgage; but both M. and E. employed C. as their counsel and agent in these transactions, and nobody else. On a bill filed by D. for a sale of the estates, and to be paid his mortgage money in the first place, one question was, whether M. and E. were to be affected by the notice to C., their agent, of D.'s security; *Et per curiam*, it is a fixed and settled point, that notice to the agent is notice to the principal. C.'s acting in different capacities makes no difference. It is the same as if they had been in different persons (F).

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A. purchases with notice in B.'s name, but without his authority, B. as-

If one purchases in the name of another person, without any authority from him so to do, and he not having notice of

(k) *Sheldon v. Cox*, Amb. 624.— *Doe on Dem. of Willis v. Martin*, [S. C. 2 Eden, 224.—Ed.] Et vide Mich. Term, 31 Geo. 3. c. 39. (E)

Principal responsible for agent.

Consequence of both parties employing same attorney.

Agent being owner of estate no difference.

(E) *Doe v. Martin* is reported in 4 T. R. 39. 66, where it was said by Lord Kenyon, that the maxim that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity; and therefore if the agent be guilty of fraud, although the principal take no part in it, yet will he be answerable for the effects of such fraud, and the transaction also will be vitiated by it. The consequence of the court acting upon this principle was, that in the case quoted, the purchaser lost an estate for which he had given nearly 8000*l.*, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money. Hence the impropriety of the mortgagee's employing the attorney of the mortgagor; for if the mortgagor be guilty of any fraud or concealment, or if he has made any previous charge or incumbrance on the estate which is withholden from the mortgagee, and to which the attorney is privy, the mortgagee, although it be proved that he was innocent of the fraud, and actually ignorant of the prior incumbrance, will nevertheless be responsible for the conduct of his agent, and be bound by the notice of a fact, the knowledge of which was in possession of his attorney.

(F) The words in Eden's Rep. are, "As to the second point, it is a fixed and settled principle, that notice to an agent is notice to the principal. If it were held otherwise, it would cause great inconveniences, and notice would be avoided in every case by employing agents. Cox being owner of the estate makes no difference; he acted in different capacities; and it is

this intention ; yet, if he afterwards agrees to it, he makes the former his agent *ab initio*. senting to purchase, bound (g).

Thus where G., in 1699, lent W. 200*l.* upon a surrender of copyhold lands (l), but neglected to get the surrender presented at the next court day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, B. agreed with W. to purchase the mortgaged premises for 400*l.* and took a surrender in the name of M., who afterwards consented to become the purchaser, and paid the money. It was proved, that B., whilst he was treating with W., had notice of the former incumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of M., and procured him to become a purchaser, that B. might be paid a debt, which W. owed him, out of the consideration money.

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On a bill filed by the executor of G. (m), M. pleaded himself to be a purchaser without notice of the plaintiff's demand ; and that his surrender was presented, and he admitted tenant, without notice of G.'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration money. But it was adjudged at the Rolls, that notice to B. was sufficient to affect M. ; for, though he did not employ B. to purchase for him, or knew any thing of it until after B. had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made B. his agent *ab initio* ; and M. was decreed to pay the 400*l.* and interest, or to surrender to the executor of G. (H).

(l) *Jennings v. Moore*, 2 Vern. 609. *Ed.] Et vide Merry v. Abney*, 1 Ch. S. C. 1 Bro. P. C. 244. [1 Eq. Ca. Ca. 38. Abr. 330. 2 Freem. 151. Nels. 59.— (m) *Ibid*.

therefore the same as if it had been in different persons. There is no difference also between personal and constructive notice in its consequences, except as to guilt." See 2 Eden. Rep. 228.

(G) So a man cannot elude the effect of having notice by procuring the conveyance to be made to a third person. *Cooté v. Mammon*, 2 Bro. P. C. 596. 5 Toml. ed. 355. In that case A. agreed to take a lease of certain lands, but previously to his signing the articles of agreement, he had notice that B. had a prior agreement for a lease of the same lands. A. disregarded this notice, and procured the lease to be granted to his son. It was held, that this notice to the father affected the son, and the prior agreement being established, he was desired to deliver up the possession to B.

Notice not eluded by conveyance to trustee.

In a late case grants in reversion were obtained by an agent and trustee from his employers and *cestui que trusts*, by fraud and misrepresentation, and afterwards assigned by him for valuable consideration to a purchaser, who had notice of the facts and nature of the title, the grants and assignments were on that account set aside, both against the agent and purchaser under him. *Dunbar v. Tradennick*, 2 Ball & Bea. 304.

Purchase with notice, set aside.

(H) The words of the decree were, " that the defendant B. was the agent of the defendant M., touching the said purchase of the said estate ; that the defendant M. is bound by the fraud of the defendant B." Reg. lib. 1707. A. fol. 351. affirmed in Dom. Proc. 1 Bro. P. C. 244.

Case in text affirmed in Dom. Proc.

Notice to agent, counsel, or attorney must be in same transaction (1).

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But, examining a title in *one* transaction, in the ordinary course of business, which cannot be supposed to make any impression, as to any future event, will not operate as constructive notice to an agent in general, or counsel, or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period (n); for, an agent or counsel cannot be supposed to remember every particular circumstance, contained in deeds or papers that come under his perusal.

Mortgagee not affected with notice to his attorney eighteen months before.

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And Lord Hardwicke, in the case of *Warwick v. Warwick* (o), expressed his approbation of the rule laid down in the case of *Fitzgerald v. Falconbridge*, above-mentioned, that notice should be in the same transaction and his Lordship said, that it should be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions (n). And in the principal case, it was held that notice, arising from a case stated (by one who was an agent for both parties in a subsequent mortgage) in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser,

(n) *Fitzgerald v. Falconbridge*, cited 3 Ves. 369. 370. 3 Atk. 294. S. C. Fitzg. 211, et vide *Worsley v. Scarborough*, 3 Atk. 392. [But where a subsequent lease was made to one by

way of mortgage, who had notice of a prior lease made for raising children's portions, it was set aside. *Aldridge v. Duke*, Finch, 439.—Ed.] (o) 3 Atk. 294.

Notice to agent must be in same transaction.

(I) And between the same parties, *Worsley v. Scarborough*, 3 Atk. 392, and this principle is adopted as well at law as in equity, 4 T. R. 66.

(K) S. L. antea, of this edit. p. 554, n. (Y), *quod vide*. So, per Lord Keeper North, in *Preston v. Tubbin*, 1 Vern. 286, though notice to a man's counsel be notice to the party, yet where the counsel comes to have notice of the title in another affair, which, it may be, he has forgotten when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party. Et vide *Harvey v. Montagus*, 1 Vern. 57. 122. and *Anon.* ibid. 318. The rule that notice to be binding must be in the same transaction, is still further exemplified by the case of a member of parliament, mentioned in Duke's Cha. U. p. 64. 638. There land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in parliament, it was declared that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the house, who spoke in the debate on the bill; yet this notice was held not to be sufficient; because it was not known to the purchaser, except as a member of parliament. *East Grinstead case*, Duke's Cha. U. ubi supra; et vide Toth. 160, ed. 1649, or 258, ed. 1671.

So, where lands were settled by F. on his marriage in 1734, which he mortgaged, among others, in 1736, to W. who had no notice of the settlement, and R. was employed as agent in making both the settlement and the mortgage; one question was, whether W. should be considered as having notice of the settlement, R. having acted as agent on both occasions (p)? And the Court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far, as to affect the principal, unless where the agent had it, at the time of his transaction with him; and that, as the notice which the attorney had of the settlement, in this case, was two years before the mortgage, the mortgagee could not be affected by it.

No notice to mortgagee of prior settlement from his attorney having made settlement two years before (L).

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of dispatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself (q). But it seems reasonable that, *in the case put*, the client should be bound; for the first agent is stated to have entered upon the business, the last agent to have finished it; and the law presumes, that whatever is known to the agent is likewise known to the principal; therefore, as the client must be considered, in law, as taking the business out of the hands of the former agent, with all the information the former agent had thereupon, the client must consequently be considered, either as having lost that knowledge on the transfer to the last agent, which would be absurd, or, as delivering the matter over to him subject thereto; any other construction would open a door to great fraud between a first agent and his client; for then the latter, on discovery that the former had notice, might remove any impediment arising from notice to his first agent, by taking the business out of his hands, and giving it to a new agent (m).

Attorney not employed throughout, notice to him will nevertheless affect principal. Semb.

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(p) *Steed v. Whitaker*, Barnard. 220.

(q) *Vane v. Barnard*, Gilb. Eq. Rep. 7, 8.

(L) What notice a clerk has by engrossing a deed prejudicial to his rights, see *antea*, 439, of this edition, note (K).

(M) The point may now be considered as settled by the case of *Bury v. Bury*, App. Sug. V. & P. No. xxv. p. 61, 5th ed.; on the reasons, perhaps, of the learned author, as adduced in the text. In the case alluded to, Lord Hardwicke said, that as to the first point there was no positive evidence of notice: the defendant denied it by her answer, and there being only one witness against that answer, a decree could not be made upon that one witness's testimony.—Where an agent had been employed for a person in part,

Rule that notice to agent not employed throughout, is notice to principal, confirmed.

What if business be taken from attorney before he enters upon it.

But the law might be more doubtful, if the first agent, by any accident, had given up the business, *without entering thereupon*; for it would be carrying this doctrine of notice very far indeed, to say, that the mere depositing the papers in an agent's hands, with a view to employ him, and taking them away before inspected, should be notice to the client of a fact, of which the agent, had he inspected them, would have found himself having notice. *Sed quære.*

Optional with counsel, &c. to be a witness.

And though counsel, &c. concerned for one of the parties may, if he please, demur to being examined as a witness (r), yet, if he consents, the Court will not refuse reading his deposition, for the right to object is *his* privilege, not that of his client (N).

But he cannot refuse to give evidence of execution of deed.

The true time of executing a deed is not such an act, of which an attorney may refuse to give evidence (s); for a thing of such a nature as the time of executing a deed, could not be called the secret of a client; for that is a thing of which he may come to the knowledge without his client's acquainting him therewith, and is of that nature, that an attorney concerned, or any body else, may inform the Court of it (o).

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(r) [Per three judges against one, in *Mattheus v. Temple*, Holt, C. J. dissent.] Comb. 467. 1 Ves. 63.

[2 Ves. 445.] *Waldron v. Ward*, Sty. 489. contra, 10 Mod. 41.

(s) Vide 10 Mod. 41.

Counsel, &c. not permitted to reveal secrets, though they offer to do so.

and not throughout, yet that affected the person with notice. In the case before him the recital in the deed of the power of jointuring was sufficient to have made the defendant have enquired into it; and therefore his Lordship held that should affect her.

(N) The contrary was holden in *Lord Say and Sele's case*, 10 Mod. 41, as the learned author has noted in his reference n. (r); and this is now the prevailing opinion of the profession; for it is considered that a counsel or attorney ought not to be permitted to divulge the secrets of his client, though he offer himself for that purpose; it being contrary to the policy of the law to permit any person to betray a secret with which the law has entrusted him. *Cuts v. Pickering*, 1 Vent. 197. And at common law confidential communications between attorney and client are not to be revealed at any period of time—not in an action between third persons—nor after the proceeding to which they refer is at an end—nor after the dismissal of the attorney; for, says Mr. Justice Buller, in the case of *Wilson v. Ratsall*, 4 T. R. 759, 760, "it is not sufficient to say the cause is at an end; the mouth of such a person is shut for ever." See also *Lindsay v. Talbot*, Bull. N. P. 284 a. and see Mr. Bridgman's n. (a). *Wilson v. Rustall*, 4 T. R. 753. *Wright v. Mayor*, 6 Ves. 280. *Sloman v. Herne*, 2 Esp. Ca. 695. *Brand v. Ackerman*, 5 ibid. 119. *Fountain v. Young*, 6 ibid. 113. *Rea v. Withers*, 2 Campb. 578. ibid. 10. and Phill. Law of Evid. 140, 4th ed.

Attachment of attorney for refusing to give evidence.

(O) Indeed, if the defendant's attorney who is a subscribing witness to an agreement, upon which the plaintiff brings his ejectment, refuses to give evidence of his attestation, the court out of which the record issues will grant an attachment against him. *Doe v. Andrews*, Cowp. 845. Every person who claims an interest in the property has a right to call upon the attorney as being the attesting witness. *Robson v. Kemp*, 5 Esp. Ca. 52. Nor does this privilege of attorneys, &c. extend to their executor, see ante, 379, of this edition, n. (G); nor to communications from col-

Neither can an attorney screen himself under this rule, if he does not disclose to the purchaser of an estate, whether absolutely or by way of mortgage, any incumbrance therein with which he is acquainted (t); for it is a principle of equity, that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction. And this rule is not only applicable to all persons having an interest in the thing contracted about, but also to the agent, attorney, or solicitor of the buyer, having a trust and duty with his principal, who is also liable to make satisfaction, if participant in the transaction. Therefore, if the attorney of the vendor of an estate, acquainted that there are incumbrances thereon, treats for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, and represents it so as to induce the buyer to trust his money thereupon, a remedy lies against him in a court of equity. And it is necessary that courts of equity should adhere to this principle, to preserve integrity and fair dealing between man and man, most transactions being by the intervention of an attorney or solicitor. This case, therefore, is distinguished from that of disclosing the general circumstances of a client, with the knowledge of which an agent is trusted, of which it would not be proper to give notice.

Attorney concealing incumbrance liable to make satisfaction.

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And if the discovery of that (u), of which a counsel is called upon to give evidence, be made to him before such time as he is retained, he is not entitled to this privilege, but may be sworn.

Counsel's knowledge before retainer, not privileged.

If one take a mortgage by assignment from a mortgagee (x), affected with notice of an outstanding title, he will take subject to that title, for his assignor cannot transfer to him a better right than he has himself.

Assignee of mortgagee affected with notice of his assignor.

And if such original mortgagee, in a bill filed by the person setting up an *eigne* title against the mortgagee and his assignee,

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And assignee bound by mortgagee's confession of notice in his answer.

(t) *Arnot v. Biscoe*, 1 Ves. 95.

mon law, see 1 Phill. on Evid. 143.

(u) *Cuts v. Pickering*, 1 Vent. 197 ;
[and on what facts an attorney or
counsel may be examined at com-

—Ed.]

(x) Vide *Whalley v. Whalley*, 1 Vern.
484.

lateral quarters, although made in consequence of the character of attorney, &c. The privilege is restricted to communications, whether oral or written, from the client to his attorney. *Spencely v. Schulenburg*, 7 East, 337. For what a counsel or attorney may disclose on examination in courts of common law, see *Bridg. Bull. N. P.* 284 b. n. (a); and *Phill. Law of Evid. Chap. VI. and Index, cxc. Counsel.*

and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him (y).

Second mortgagee with notice of first, but without notice of charge prior to both, of which first mortgagee has notice, must take subject to that demand, and consequently to the notice (P).

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Legal estate not taken from mesne mortgagee.

Puisne mortgagee lending money after act of bankruptcy not deprived of eigne mortgage purchased in, if eigne mortgage be given before act committed (Q).

Therefore, if an estate be settled upon trust for raising a specific sum, and afterwards a mortgage be made thereof to a mortgagee, with notice of that trust, and then a subsequent mortgage be made to one who hath notice of the prior mortgage, but not of the antecedent trust of which the first mortgagee had notice, yet the last mortgagee must take subject to that demand (z); for he having notice of the first mortgage, which is prior to his, but posterior to the trust, must consequently take, subject to the first mortgage; and being subject to that, must be subject to every thing that was subject to. This may be proved, by considering the right and order of redemption in the Court; as for example, the *cestui que trust* of the trust-estate, having a prior incumbrance, may compel the first mortgagee to redeem him, which if done, the former will have a right in both capacities to compel the last mortgagee, or those claiming the benefit of that mortgage, to redeem him as to both; for a court of equity will not take from the *mesne* mortgagee the legal estate, which he will have got from the trustees, unless his demand be wholly satisfied.

Notice of an act of bankruptcy will not be presumed against a *puisne* mortgagee, who lends his money after the act of bankruptcy committed, to take from him the benefit of an *eigne* incumbrance purchased in; for though, at law, the assignment to the assignees hath relation back to the time of the act of bankruptcy committed, and the construction of statutes be the same in equity as at law, yet it would be too hard to extend a penal law, in a court of equity, to the prejudice of the mortgagee. Besides, where a statute is to be carried into execution, in

(y) Vide *Whalley v. Whalley et al'*.
1 Vern. 484.

(z) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 185.

Voluntary and compulsory payments to bankrupt, distinguished.

(P) *Secus*, if the first mortgagee have no notice of the charge, or if the second mortgagee have no notice of the first, 2 Bro. C. C. 66.

(Q) Note, voluntary payments to a bankrupt, with notice of an act of bankruptcy actually committed, are bad, *Prickett v. Down*, 3 Campb. 131; but payments enforced by coercion of law are good against the future assignees. *Foster v. Allanson*, 2 T. R. 479. The same distinction was taken in *Pym v. Benson*, 1 Freem. 349.

equity, the rule, that a purchaser for a valuable consideration, without notice, shall not be deprived of any advantage, which will enable him to defend himself, will be applied as well in cases arising under an act of parliament, as in those occurring at common law.

Thus, where T. having made mortgages (a) of some parts of his estate, these mortgages afterwards, by *mesne* assignment, became vested in W. and carried with them the legal estate. T. then became a bankrupt, but, before the assignment of T.'s effects to the assignees, W. obtained a release of the equity of redemption from T. for a valuable consideration; on a suit brought by the assignees against W. to set aside these conveyances, it was held, that a purchaser for a valuable consideration, without notice of the bankruptcy, could not be relieved against, within 21 Jac. 1. (R).

(a) *Collett v. De Golls*, Ca. temp. Talb. 65.

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Assignees cannot compel redemption against mortgagee having legal estate and purchasing equity of redemption after act committed, but without notice thereof.

(R) Cap. 19. s. 14. Before that statute a sale or mortgage by a trader, after an act of bankruptcy upon which a commission afterwards issued, might be defeated at any period however distant. The death of the trader without a commission of bankrupt against him, was the only certain security to a mortgagee or purchaser under him. The above statute enacted, that no purchaser for good and valuable consideration, should be impeached by virtue of this act, or any other act theretofore made against bankrupts, unless the commission to prove him or her a bankrupt should be sued forth against such bankrupt within five years after he or she should become bankrupt. Sir S. Romilly's act, 46 Geo. 3. c. 135. 1806 (explained and extended by 49 Geo. 3. c. 171. and see 1 Campb. 491) followed and reduced the period of five years to two calendar months, as stated in a previous note. See *antea*, 563, n. (T). By Sir Samuel Romilly's act, all conveyances by, all payments to, and all contracts with a bankrupt, made *bonâ fide* two months before the date of the commission of bankrupt, are declared good and binding on the assignees. To a conveyance therefore after a commission issued, or a docket struck, this statute does not apply. But the statute of James may, in such a case, it is presumed, if five years have elapsed since the conveyance, be insisted on as affording substantial relief, provided the purchaser had not actual notice of the commission or docket previously to his paying his purchase money, or to the execution of the conveyance. Consequently the statute of James is not entirely repealed by the late act of Geo. 3.

Stat. of James not repealed by Sir S. Romilly's act.

The proposition of the learned author in the text is, that as to the statute of James, if a purchaser *bonâ fide* without notice of the act or commission of bankrupt, can procure a legal estate, he may protect himself under that legal estate both as against an act and a commission of bankrupt, however recent or however long ago that act or commission may have been committed or issued. The soundness of this position we propose in this note to investigate; and then, 2dly, to inquire whether a similar doctrine can be stated in regard to the late act of Geo. 3.

Subjects for consideration proposed.

1st. The principal authority for the above doctrine is the decision of the Court of Chancery; in the before mentioned case of *Collett v. De Golls*, which subsequent *dicta* have greatly invalidated, if not entirely over-ruled, but upon what grounds we are now to consider. The words of Lord Talbot in *Collett v. De Golls* are these:—"There certainly may be cases where a purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in this court to discover any thing (whether incumbrances that he has got in, or any other thing), but all advantages shall be left him to defend himself. Suppose two purchasers without no-

Collett v. De Golls confirmed by Lord Eldon.

*Mortgagee
having best
right to legal
estate may pro-*

And, if the mortgagee hath a better title or right to the legal estate (aa), although it be not conveyed to him, yet he may

(aa) [As to such better title or right, see antea, 477, n. (S).—Ed.]

tice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself. *I do not therefore think a purchaser for a valuable consideration, without notice of the bankruptcy, to be relieved against in this court within 21 Jac. 1st.*"—This case of *Collett v. De Golls* is generally considered as deciding, that if a mortgage of a legal estate be made before an act of bankruptcy, and the mortgagee make further advances after the act committed, but without notice thereof, the assignees cannot compel a redemption without paying all the money advanced; that is, that the mortgagee not having had notice, may make use of his prior legal estate as a protection against the act and commission of bankrupt. This is in a great measure confirmed by what fell from the present Lord Chancellor, in the case of *Knott ex parte*, 11 Ves. 609. His Lordship, in the course of the arguments, in that case, said, "the case of *Collett v. De Golls* proves that money advanced after an act of bankruptcy, may be tacked and charged upon the estate, notwithstanding the property is taken out of the bankrupt; and it was urged there, that he had nothing to convey by the second mortgage; yet it was held, that though the legal effect of the second mortgage was nothing, the court would consider it a second incumbrance. The distinction was taken, that a secret act of bankruptcy did not prevent tacking as a commission actually issued did; that being notice to all the world." See *vide* what is said antea, 565, n. (T), as to a commission being notice to all the world.

*Further argu-
ments in favor
of that case*

His Lordship again alluded to the principle of *Collett v. De Golls*, in the course of his judgment in the above mentioned case of *Knott ex parte*, see 11 Ves. 619, where he in effect observed:—"It is said the act divests the bankrupt of all his interest, and when the commission follows, it operated by relation from the time the act of bankruptcy was committed; and then the person taking the second security really takes nothing; no interest passing from the bankrupt, there can be no tacking; for the operation of the commission is to reduce to dust and ashes the second security. But all the cases shew that this objection will not do; for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy and after a commission issued." This, it is apprehended, is the true interpretation which the evasive and conflicting report of Lord Eldon's observations in *Knott ex parte* (11 Ves. 619) ought to receive. The marginal note too of that case favours this construction, "the right to tack in equity is not affected by the relation to the act of bankruptcy." Indeed the effect of a different interpretation would be to over-rule the case of *Collett v. De Golls*, which appears to have been long acquiesced in, and which Lord Eldon, from his previous recognition of that determination in the same case, could never have meant to have done; for certainly his Lordship could not have been aware that the authority of that case had ever been impugned, and at the same time have decided in direct conformity with it.

*Lord Redes-
dale's dictum
against it.*

Next follows the two cases which are said to militate against the authority of *Collett v. De Golls*, so far as that case tends to support the doctrine above stated; the first is that of *Latouche v. Dunsany*, 1 Sch. & Lef. 152; and the second that of *Herbert ex parte*, *ubi infra*. *Latouche v. Dunsany* turned on the construction of the registry act; and a comparison was made between the principle there contended for and that laid down in *Collett v. De Golls*, where it was said, that in the lastly-mentioned case equity refused to take the legal estate from Ward, unless upon payment of the sums advanced after the bankruptcy without notice, though the words of the bankrupt laws were as strong for avoiding all acts done after bankruptcy, as those of the registry act to avoid the unregistered deed. The court however observed, that "it was then the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy;" and decided, that a mortgagee is prevented by the operation of the registry act, 6 Anne, c. 2. from tacking so as to gain priority against

protect himself thereby, from an act of bankruptcy. Thus, *test himself from act of bankruptcy.* where H. B. on May 1st, 1710, was arrested at the suit of one

mesne registered incumbrances. On this case it is worthy of remark, that the observation of the court on *Collett v. De Golls* was perfectly gratuitous, and what perhaps it would not have made on a full inquiry into the question, had it been called upon expressly to decide the point. The decision was in unison with the remark, because not only in that case, but in every case where a first mortgagee makes further advances having notice of the second, either by act of parliament, registry, or actual information, the decision must be the same; and therefore it cannot be inferred, that the *dictum* of the court had any influence on its subsequent determination, so as to make it applicable to a denial of the authority of *Collett v. De Golls*.

The second case is that of *Herbert ex parte*, 13 Ves. 183, which assumes more of an hostile aspect, and threatens entire destruction to the decision we are now considering. Lord Chancellor Erskine is reported to have said, that the moment an act of bankruptcy is committed, there is an end of all relation between the individual and his property, and the party taking the security afterwards takes nothing; and his Lordship gave judgment accordingly. On a subsequent day, however, some of the parties not being aware that judgment had been given, Lord Erskine went through the circumstances of the case again; repeating his clear opinion, that the case of *Collett v. De Golls* was not law, principally on the authority that Lords Eldon and Redesdale had (as his Lordship understood them) both expressed their opinions against that case. In this however Lord Erskine seems to have been mistaken, especially as to the opinion of the former noble Lord, as will, it is conceived, be apparent by reference to the extracts from Lord Eldon's judgment in *Knott ex parte*, introduced in the earlier part of this note.—The case of *Herbert ex parte* is an express authority for the position, that a mortgagee cannot tack subsequent advances to his mortgage if those advances have been made *after* the mortgagor has committed an act of bankruptcy, although they may have been without notice of the act committed, and the mortgagee might have had a prior legal estate. The reason inducing the determination in this case might perhaps have arisen from the consideration, that the act of bankruptcy was of itself constructive notice to all the world, provided a commission issues in relation to that act. If that be admitted, the case is reconcilable with the former authorities; and it is barely necessary to remark, that such appears to have been the prevailing opinion at the time the case of *Herbert ex parte* was decided. But it seems to be a settled point now, that a commission of bankruptcy is not of itself notice, nor is the advertisement of the party's being found a bankrupt, which is always inserted in the Gazette, of itself notice to the creditors, or what they are bound to take notice of. That is a circumstance, says Lord Ellenborough, in *Howell v. Browning*, 7 East, 161, from which the jury may presume notice, but it is not in itself actual notice. But further with respect to the cases of *Latouche v. Dunsany* and *Herbert ex parte*, and even of *Knott ex parte*, it seems to have escaped observation that the precise point in dispute had been previously decided by the case of *Hitchcock v. Sedgwick*, ante, p. 552, of this ed. n. (T), in the House of Lords, which of course is an authority paramount to all others. It was by that case in effect determined that a mortgagee, not having actual notice of the act of bankruptcy or commission of bankrupt, may tack advances made subsequently, not only to the act of bankruptcy, but also even to the commission issued.

We may therefore venture to conclude, that the case cited in the text is an existing authority; for the doctrine advanced by the learned author, notwithstanding its principle has been doubted, and even in one case expressly over-ruled. But it must, it is apprehended, be received with this qualification, that the legal estate, to afford protection, must have been created five years before the commission issued; for otherwise such legal estate will be impeachable under the statute. To illustrate this by example: suppose an act of bankruptcy to have been committed in 1810, a mortgage of the legal estate for a term to have been executed in 1812, a commission of bankrupt to have issued in 1815, and the estate to have been sold by the bankrupt (before an assignment to the assignees) to a purchaser for valuable consideration, without notice of either the act or commission of

Case in text over-ruled by Lord Erskine.

Grounds of his Lordship's decision questioned.

Act and commission of bankrupt may be evaded by prior legal estate under statute of James.

S. (b), for a just debt of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff

(b) *Wilkes v. Bodington*, 2 Vern. 119, largely stated upon further 599, *supra*, 477. [et vide S. C. semb. hearing.—*Ed.*]
nomine Read v. Ward, 7 Vin. Abr.

Whether same may be said with reference to stat. Geo. 3.

Sir S. Romilly's act.

Whether purchaser, after act or commission of bankrupt without notice of either, may protect himself by prior legal estate?

bankrupt, and the purchaser to have paid off the mortgage made in 1812, and have procured an assignment of the legal estate for the term to a trustee of his own nomination,—in this case it is conceived, the purchaser could not shelter himself under the protection of the legal term against the claim of the assignees; for the mortgage itself was impeachable under the statute, the commission having ensued in due time on the act of bankruptcy. And this, it should be remembered, is a case without the scope of the late act, to which it is now time to advert.

2dly. It was proposed to inquire whether under the act of 46 Geo. 3. c. 135, a *bond fide* purchaser between an act of bankruptcy and the issuing of a commission, or after a commission actually issued, but before an assignment to the assignees (such purchaser being without actual notice of either the act or commission), can, by procuring a legal estate, created two calendar months prior to the commission issued or docket struck, protect himself against the assignees of the bankrupt vendor.

The statute enacts, "that in all cases of commissions of bankrupts thereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings by and with any bankrupt, *bond fide* made and entered into more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt, had not at the time of such conveyance, payment, contract, dealing, or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment;" and it is, in the third section of the act, provided "that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, [or the striking a docket for the purpose of issuing a commission, whether a commission shall actually issue thereupon or not,] shall be deemed notice of a prior act of bankruptcy for the purpose of the act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission or striking such docket."

If therefore an act of bankruptcy be committed to-day, a mortgage for a term of 1000 years executed by the bankrupt to-morrow, and no commission issued for more than two months after the mortgage, the mortgage, it is clear, will be binding on the assignees of the bankrupt mortgagor. Let us further suppose, that two months and a day elapse between the mortgage and the commission, and in the interval the bankrupt to sell his equity of redemption to A. (which sale would be clearly void as against the assignees), and afterwards A. to purchase in the prior mortgage, many writers on this subject agree that A. may make use of the legal estate thus acquired as a protection against the assignees; and *this* perhaps on the rule in equity, that a purchaser for a valuable consideration without notice shall not be deprived of any advantage which he may derive from the legal estate at law. But this rule would have applied with more force if the purchase of the equity of redemption had been made after the commission issued, and the legal estate had been more than six years standing, as then the act of Geo. 3. would not have applied, and the statute of James might have been over-reached by means of the legal estate. It cannot however escape observation, that in the case where A. purchases the equity of redemption in the two months' interval between the mortgage and commission, he will be a purchaser with notice of a prior act of bankruptcy; for the issuing of the commission before two months have elapsed since his purchase, will, as to that purchase, affect him with notice of the prior act of bankruptcy by means of the proviso added to the third section of the act of Geo. 3; and though in a similar case under the statute of James the argument of a purchaser without notice may, under the authority of the case quoted in the text, prevail in favour of the purchaser of the equity of

above six months, which, although he afterwards paid the debt, and many thousand pounds to others, and appeared pub-

redemption against the assignees, yet it could not under the act of Geo. 3, because the subsequent commission is declared to be notice of the prior act of bankruptcy, provided such commission be sued out within two months after the purchase or conveyance.

Mr. Preston expresses the doctrine in these terms:—"A legal estate will protect a purchaser from an act of bankruptcy of which he has not any notice. *De Golla v. Ward*, Ca. Temp. Talb. 243. 7 Vin. Abr. 121. But at this day no one will readily accept the title of a trader after notice of his insolvency by a composition with his creditors. And after a man has committed an act of bankrupt (*Loves v. Lush*, 14 Ves. 547. *Franklin v. Lord Broomfield*, *ibid.* 550), he cannot force his title on a purchaser by a bill for specific performance." 3 Pres. Abs. 390. The first sentence of this passage supports the position, that a purchaser after a commission issued, who acquires a prior legal estate, may defy the assignees notwithstanding either statute (taking a commission issued not to be in itself notice), but militates against the doctrine that, under the late act, a purchaser of the equity of redemption, acquiring a prior legal estate, may also set the assignee at defiance; for such a purchaser is not a purchaser without notice. Mr. Maddock, treating of the doctrine of tacking a first and second mortgage together, conceives, that under the 46 Geo. 3. c. 135, if the subsequent mortgage were made *bona fide* two months before the date of the commission, without notice of any prior act of bankruptcy, or that the mortgagor was insolvent, or had stopped payment, the same might be tacked. Of this there can be little doubt, notwithstanding what was said in *Knott ex parte*, 11 Ves. 686, namely:—"that a mortgagee will not be permitted to tack as against assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, though without notice and previous to the commission; for that, by such mortgage, no interest passes." Mr. Sugden, on the same subject, observes,—"So where a purchaser *bona fide*, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favour of purchasers; that it does not say affirmatively, that a commission issued two months after a conveyance shall bind where a commission has been issued, or a docket struck prior to the purchase; but merely enacts negatively, that a commission issued after that time shall not bind, unless a commission was issued or a docket struck before the purchase." These reasons however are far from convincing, and are not very intelligible. The proposition too, that if a purchaser has a prior legal estate he may make use of it against the assignees, is very vague and inconclusive.

From this view of the subject considerable difficulty arises in answering the question proposed in this second section of the note. If an answer (in the absence of express decision) may be hazarded, the editor submits, *first*, that a *bona fide* purchaser, between an act of bankruptcy and the issuing of a commission, cannot, by obtaining the assignment of an outstanding legal estate, created two months prior to the commission, protect himself against the assignees of the bankrupt vendor; and, *second*, that a *bona fide* purchaser, after a commission issued and before an assignment to the assignees (such purchaser being without actual notice of either the act or commission of bankrupt) may, by procuring a legal estate, created two calendar months prior to the commission, defend himself against the assignees of the bankrupt vendor; for equity will not deprive him of the legal estate, which he has had the good fortune to acquire: and even supposing the bargain and sale of the commissioners to the assignees to relate back to the act of bankruptcy, and such act of bankruptcy to precede this latter purchase, yet, it is conceived, the purchaser would be safe, since an act of bankruptcy is not in itself notice, and the statute of Geo. does not apply.

But actual notice of an act of bankruptcy, or a commission of bankrupt, will entirely deprive the purchaser of all benefit to be derived from either of the acts of James the 1st or Geo. 3d.

So much of the latter statute as makes the striking of a docket notice in all events, and which is enclosed in the above extract, between brackets, has been repealed by 49 Geo. 3. c. 121. The insolvency, mentioned in this

Expressions of doctrine by Mr. Preston and Mr. Maddock.

Also by Mr. Sugden.

Points submitted.

Actual notice.

Repeal of part, and explanation of other parts

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tically on the exchange, was adjudged an act of bankruptcy by the statute of Jac. 1. Afterwards, in 1717, H. B. on the marriage of the defendant, his son, made a settlement, by which, after reciting that he had on his own marriage settled land, on trustees, in trust, to secure 2000*l.* to his wife if she survived; H. B. *with the privity of the trustees, who were parties to it*, assigned all his estate, right, title, and interest, to the wife's relation, for the benefit of H. B. the son, for life, and of his wife for life, &c. The plaintiff W. was the assignee under a statute of bankruptcy, taken out against B. subsequent to the settlement. The question was, whether a court of equity would decree the trustees of the first settlement, to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement.

For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, *being parties to the last settlement*, were become their trustees. And it was so held by the Chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a prior legal estate, but where he had a better title, or right, to call for the legal estate than another; and therefore dismissed the bill.

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Judgments on record not of themselves notice (s).

A mortgagee may tack a *puisne* to an *eigne* incumbrance, notwithstanding an intermediate judgment at law; for though

of Sir S. Romilly's act.

statute, means a general inability in the bankrupt to answer his engagements. *Anon.* 1 Campb. 491, n. Mr. Justice Le Blanc, in a late case, (*Bayley v. Schofield*, 1 Maul. & Selw. 338), took insolvency, as it respects a trader, to mean, that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent, because he may ultimately have a surplus upon the winding up of his affairs; and Mr. Justice Bayley agreed, that insolvency means that a trader is not able to keep his general days of payment; and that he is not to be considered as solvent, because possibly his affairs may come round.—The provision, that the issuing a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded without being opened, although it has been contended, that the legislature must have meant a commission opened and acted upon though afterwards superseded. See *Watkins v. Maud*, 3 Campb. 308, et vide other cases on this statute, *Brooks v. Sowerby*, 2 J. B. Moore, 55, and *Southwood v. Taylor*, 1 Barn. & Ald. 471.

(S) So, in *Suelling v. Squibb*, 2 Ch. Ca. 47, a plea of purchase for valuable consideration without notice, was held good, though there was a judgment entered up against the vendor at the time of the purchase. In like manner Lord Talbot held, that docketing a judgment did not amount to constructive notice, for judgments were infinite. 2 Eq. Ca. Abr. 682, (D), n. (b). See also 2 Freem. 176, and further, as to judgments, *ante*, 273, n. (O), of this edition.

Docketing judgments not notice.

of record, it will not affect him, without he be proved to have had express notice thereof, before he lent his money. Thus, where the plaintiff, having a judgment and a mortgage (c), exhibited his bill against the mortgagor, and conusee of a statute by the mortgagor, to have a discovery of what was due on the statute, that being precedent to the plaintiff's securities, and, upon payment, to have the same set aside; the conusee pleaded, that, after the extent, the accounts had been stated between him and the conusor, and an absolute conveyance of part of the extended lands had been made to him in consideration of his re-assigning the remainder to the conusor; and that so he was a purchaser for a valuable consideration, without notice of the plaintiff's title.

It was insisted, on behalf of the plaintiff (d), that his judgment being of record, the defendant was bound to take notice thereof, at his peril, and that, in this case, the defendant ought not to protect his pretended subsequent purchase by his precedent statute, but that he ought, upon payment of the statute, to yield possession to the plaintiff. This was strongly opposed by the defendant's counsel (e), who argued, that though judgments were of record, and a purchaser was bound to take notice of them at law, yet, in equity, where the conusee of a judgment comes to be helped to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against him; and upon this point the plea was allowed.

But, in the last case, the term, "express notice," must be understood, as used in opposition to constructive notice, arising from the act being of record; for I apprehend, what shall, or shall not, be considered as evidence of notice of a judgment, independent of the record, is open to the opinion of the Court, and rests, either in positive proof of the express fact of notice, or in implication from other facts proved, irreconcilable with want of notice of the existence of the fact, notice of which is charged. And, consequently, that if there be any circumstances in the case, from whence it may reasonably be concluded, that the *puisne* incumbrancer had notice of a judgment standing out at the time of advancing his first money, the Court will not suffer him to protect himself by getting in

They are at law, but not in equity, (T) arg^o.
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But there may be constructive notice of judgments, independently of record.

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(c) *Churchill v. Grove*, 1 Ch. Ca. 35. *Greswold v. Marsham*, 2 Ch. Ca. 170.
S.C. Nels. Ch. Rep. 89. Et vide (d) *Ibid.* (e) *Ibid.*

a prior charge on the land, although no express notice be proved (v).

Of lien of judgment on land.

Now we are speaking on the effect of notice of judgments; it may not be thought irrelevant to investigate the grounds on, and extent to, which judgments are binding on lands, in the hands of purchasers or mortgagees, which will lead us to a knowledge of those cases in which it is material for a purchaser or mortgagee to attend to notice of judgments.

At common law lands not taken in execution for debt,

It seems perfectly clear; that by the common law (f), for a debt for which a man had a judgment, he could not have taken lands in execution, in the case of a common person, but the goods and chattels, and profits of the debtor's corn and other crops that grew upon the land; the reason of which was, that the law did not permit the creditor to take away the possession of the debtor's lands, for that would have hindered the following of his husbandry and tillage, which was beneficial to the commonwealth.

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except crown debts,

But the crown might, by its prerogative (g), have had execution against the lands of the debtor.

or lands were in hands of heir.

So, in the case of an heir, chargeable by the bond of his ancestor, the creditor might have taken all the lands of the ancestor in execution in the hands of the heir, by *levari facias*, and yet he could not have had any execution of them against the ancestor himself; the reason for which was, that the common law gave an action against the heir, and in such case, if he should not have execution against the land against the heir, he could have no fruit of his action; for the goods and chattels of the debtor belong to his executors or administrators.

Nor could a use be taken in execution.

No doubt, it is apprehended, can be entertained, but that if lands could not have been taken in execution upon a judgment at common law, in the case of a common person, *an use* could not; for at common law, in a stronger case, if *cestui que use* had been attainted of treason or other offence, the use was not forfeited to the king; *because it was a thing of which the law did not take notice* (h), for that the *cestui que use* had neither

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(f) Sheph. Prac. Couns. 305. 2 Roll's Rep. 296. 2 Inst. 394. 2 Rep. 12. 3 Rep. 12. 2 Atk. 609. Amb. 16. (g) Hard. 488. 495, 6. 3 Ch. Rep.

20. 11 Co. 92, 93.

(h) Hard. 492. 3 Inst. 19. *Marquis of Winchester's case*, 3 Rep. 1.

(U) If, for instance, it can be proved that the party searched the records of the court, this, it is conceived, will be enough to bind him with constructive notice of all judgments there entered, though he might have overlooked them.

jus in re nor ad rem. And if an use was not forfeited, of which there might be a *possessio fratris*, &c. and which would descend to the heir, *à multo fortiori*, it could not be subject to the execution of a subject; for if it had been, then should a subject have been in a better condition as to a use, in respect of execution upon a judgment, than the king, in respect of a forfeiture for treason; whereas it appears that, at the common law, the king was in a better condition than a subject, in respect of execution for his debt; as he could have execution for it against his debtor's lands, which the subject could not.

It follows from the above remarks, that as well lands, as uses and trusts, so far as they are, at this day, liable to execution in the case of a common person, are so subject by force of some statute.

By statute of Westminster, 2. [13 Edw. 1.] cap. 18. *Cum debitum fuit recuperatum* (i), when debt is recovered or acknowledged in the King's Court, or damages awarded, an election is given to the creditor to have a *feri facias* unto the sheriff to levy the debt of the lands and goods, or that he should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and one half of his land "*medietatem terræ*," until the debt be levied upon a reasonable price or extent. From this right to elect, the writ of *elegit* seems to have taken its name (v). And it is agreed by the best authorities, that this

Execution
against land
given by stat.
Westm. 2.

[611]

Origin of
elegit (w).

(i) 3 Bulst. 63. 3 Rep. 12. F. N. B. 263. 9.

(V) Or rather from the words of the writ, *Quod elegit sibi executionem*, &c.

(W) A writ of *elegit* lies against the debtor in his life-time, or his heir and terre-tenants after his death, App. to Tidd's Practice, cap. xxxix, s. iii.; and it may be had against peers of the realm, as well as others; and also against executors and administrators; 1 Crompt. 346. Upon this writ, the sheriff is to empanel a jury, who are to make enquiry of all the goods and chattels of the debtor, and to appraise the same; and also to enquire as to his lands and tenements. Co. Lit. 289 b. Dyer, 100. Cro. Eliz. 584. Com. Dig. tit. Execution (C). The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them; Gilb. Exec. 33, and in this respect an *elegit* differs from a *feri facias*, upon which the sheriff cannot deliver the goods, though he may sell them to the plaintiff. *Pullen v. Purbeck*, 1 Ld. Raym. 346. 2 Bac. Abr. tit. Execution, 349. 352. If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands, 2 Inst. 395. 1 Crompt. 346, but otherwise he may extend them; and he may not only extend a moiety of the lands properly so called, but also a moiety of a reversion, Gilb. Exec. 38, or rent-charge, Moor. 32, or lands whereof a man is seized *jure uxoris*, Dalt. Sher. 136; or lands in ancient demesne, *Cox v. Barnsley*, Hob. 47, 48; in short he may extend every other species of landed property; but if an estate tail be extended, the issue may avoid it after the death of the tenant in tail, by assise or writ of *audita querela*, *Ashburnham v. St. John*, Cro. Jac. 85. Gilb. Exec. 391; and if one of two joint tenants confesses a judgment, and dies before execution, it will not bind the survivor. 1 Inst. 184 b. *Abergarra's Ca.* 6 Rep. 79. But copyhold lands are not extendible. 1 Roll. Abr.

Elegit, against
whom, and for
what it lies.

was the first statute that subjected the land to an execution upon a judgment, or a recognizance, which is in the nature of a judgment.

888; nor a rent seck, Cro. Eliz. 656; nor an advowson in gross, or glebe belonging to a parsonage or vicarage; nor the church-yard. Gilb. Exec. 39; et vide *Arbuckle v. Cowtan*, 3 Bos. & Pul. 347. A term for years may either be extended or sold as part of the personalty. 8 Co. 171. 340, et vide infra, p. 617, *in notis*. If it be extended, the plaintiff is accountable for all the profits he receives out of the term upon such extent; and if he receives the debt out of such term before it expires, the defendant shall be restored to the term itself; but otherwise he shall keep the term, and not account for the profits of it. Gilb. Exec. 33. 35. We have seen that an equity of redemption cannot be taken in execution, though it be deemed assets; ante, 257, of this edition, n. (K), and 369; see also 2 Freem. 115. 2 Atk. 290; and therefore, where the estate is in mortgage, the plaintiff's remedy is by filing a bill in equity to redeem; see ante, 257, of this edition, n. (K).

Ejectment necessary to obtain possession.

It was formerly usual for the sheriff to deliver actual possession of a moiety of the lands; but he now only delivers legal possession: and if the plaintiff do not enter, which it seems he may do by virtue of the *elegit*, he must, in order to obtain actual possession, proceed by ejectment. In a recent case, however, Chief Justice Gibbs said, he had always been of a different opinion; but he would not consider the case then under consideration as deciding the point. See *Rogers v. Pitcher*, 6 Taunt. 206, 207. S. C. 1 Marsh. 542. In ejectment under *elegit* an examined copy of the judgment roll, containing the award and return of the inquisition, is evidence of the lessor of the plaintiff's title without proving a copy of the *elegit* and inquisition. *Ramsbottom v. Buckhurst*, 2 Maul. & Selw. 565. Sed vide Running. Eject. 330, contra.

Tenant by elegit holds quousque, and must account, when.

When lands are extended under an *elegit*, the creditor holds them "*quousque debitum satisfactum fuerit*;" that is, as a chattel, until the debt recovered, and stated damages are repaid, and no other damages or expences, nor even interest, are allowed, *Fulwood's case*, 4 Co. 67. 2 Inst. 678; and as the annual value of the land extended is ascertained by the inquisition and extent, the time when the debt will be satisfied is certain, and the debtor may re-enter without a previous writ of *scire facias*. *Burcell v. Harwell*, Cro. Car. 598. But as the lands are always extended much below the real value, and as the debtor cannot on a writ of *ad computandum* at law insist on the creditor's doing more than account for the extended value, he is driven for remedy into a court of equity, which acting on its principle, that he who seeks equity must do equity, will compel him to pay interest on the debt, although it should exceed the penalty on the judgment. *Godfrey v. Watson*, 3 Atk. 517. *Owen v. Griffiths*, Amb. 520. *McClure v. Dunkin*, 1 East, 436; et vide ante, 405, *in notis*. The debtor cannot, as already observed, by writ *ad computandum* at law, compel the creditor to account for the profits beyond the extended value; yet if by any casual profit the creditor is satisfied his debt, or if part has been levied, and the debtor in court tenders the residue, the debtor may have his writ of *scire facias ad rehabendam terram* to ascertain the accidental profit, and for recovery of the land: but in this latter case the tender must be in court, and of the money actually due, and not an offer to come to an agreement. The debtor may also have a *scire facias*, if he has obtained an acquittance; but a *scire facias* will not lie on a general averment, that the creditor has received his debt by means of the improved value or rental of the land, if the value or rental be improved by the creditor himself; for of that the debtor can take no advantage. 2 Roll. Abr. 483. Bac. Abr. Exec. 708. 2 Inst. 396.

Of other matters relating to writ of elegit.

No notice is given of executing an *elegit*, 1 Crompt. 363; and if there be no lands, the sheriff need not return an inquisition, *Stonehouse v. Ewin*, 2 Str. 874; but otherwise an inquisition must be taken and returned, describing the lands with convenient certainty, Moor. 8. Com. Dig. tit. *Execution* (C); and after it is taken, the sheriff must deliver a moiety to the plaintiff by metes and bounds. Dalt. Sher. 135. If the defendant hath no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*, *Beacon v. Peak*, 1 Str. 226. Lan-

The words "*Cum debitum fuerit recuperatum (k)*," "when debt is recovered," are explained by Sir E. Coke, in his reading on this statute, to mean "by judgment in an action of debt, or any action wherein damages are recovered." Lord Coke's exposition of this statute.

"*Aut recognitum (l)*," or "acknowledged," is expounded by the same author, to mean "by recognizance, acknowledged in any court of record, that hath power to receive the same."

"*Medietatem terræ suæ (m)*," is said in the same reading, and agreed by the best authorities to be understood of the half of such land (n), as the defendant had at the time of the judgment given, or of the recognizance acknowledged, unless it be conveyed away by fraud and covin to deceive his creditors, contrary to the statute in that case provided. [612]

And upon these words "*medietatem terræ (o)*," the sheriff may extend a lease for years, and the like.

After this statute, upon a judgment given for debt (p), or damages in the two courts of record at Westminster, generally the moiety of all the land that the defendant had *tempore redditionis iudicii*, or at any time after, and all the goods and chattels he had *tempore executionis*, or the day of the writ awarded, became subject and liable to the execution. Moiety of lands and all goods may be taken (x).

But it seems that for a debt for which a man had a judgment or recognizance, he was not, by this statute, enabled to have execution against lands in use to, or on trust for, his debtor; for the statute of Westminster only extended to lands at the common law (q). Stat. of Westminster does not extend to uses or trusts.

(k) 2 Inst. 395. (l) Ib. (m) Ib. 617, in notis.—Ed.]

(n) Cro. Jac. 451. 42 E. 3. 11. (p) Sheph. Prac. Coms. 305.

42 Ass. pl. 17. 2 H. 4. 14.

(q) 1 Roll's Abr. 888, pl. 6. S. P. C.

(o) 2 Inst. 395. [et vide postea, 299.

ester v. Fielder, 2 Ld. Raym. 1451; and a void *elegit* or inquisition being as none, it will not prevent the plaintiff from having a new *elegit*, Gilb. Ex. 54: and he may award *elegits* into as many different counties as he pleases, without being under the necessity of suing out *testatums*. 1 Crompt. 346. 352.

(X) But although no more than one moiety can be taken in execution under one judgment, yet it has been decided that a plaintiff, by obtaining two judgments, each of the same date, and by suing a separate execution on each judgment, may take a distinct moiety under each execution, and then, by moieties, have the entirety in execution. *Attorney-Gen. v. Andrew*, Hard. 23. But if one moiety be already taken in execution, a second judgment creditor can take but one fourth, that is, a moiety of the remaining moiety, and so of the like. See *Huyt v. Cogan*, Cro. Eliz. 482. The consequence is, that a third judgment creditor can take but an eighth, and a fourth judgment creditor but a sixteenth part of the estate, when perhaps the first judgment may not be for as many hundreds as the fourth is for thousands. But no well founded reason appears why such a judgment creditor should be deprived of an adequate remedy for his debt, merely from the circumstance of previous creditors having taken moieties, or other aliquot parts of the estate, for debts infinitely below perhaps the real value and produce of the land.

Entirety extendable by two judgments.

[613]

It is plain from the construction of the statute of treason, 25 Edw. 3. that the word "lands," did not in a statute include a use or trust; for in that statute, the words "lands and tenements" are found, and yet that statute did not extend to uses and trusts, which is remedied by the statutes of 33 Hen. 8. cap. 20. and 27 Hen. 8. cap. 10 (r).

Uses and trusts
made liable to
execution by

But the statute 26 Hen. 8. cap. 13. did extend to uses (s); because that statute expressly enacts, that the offender shall lose all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance in use or possession by any right, title, or means, which word "use," Lord Coke says, was necessary to be added, for by the common law, an use, which was but a trust and confidence, was not forfeited by attainder of treason.

stat. Rich. 3d.

Accordingly, we find in a case, 11 Hen. 7. 23, pl. 10. in which, in trespass, it was pleaded, that one seised in fee, enfeoffed A., B., and C., to the use of himself and his heirs, and afterwards the plaintiff sued execution against the land on a statute merchant. Rede, Justice, said, if this plea be good, it must be by the statute of Richard the 3d of feoffments to others use, and this is not in the case of a statute.

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Trust lands
not assets in
equity.

And in another case, 21 Hen. 7. 19 b. pl. 31. on *elegit*, the sheriff returned, that the defendant had nothing in the case, except an use. *Et per curiam*, a new *elegit* shall issue against the lands in use. But Broke, in abridging this case, tit. *Elegit*, pl. 11, says, *Et sic vid elegit puis elegit et de terre en use. Quære PER QUA LEGE? Videtur per statutum de Richard the 3d.*

And in the case of *Pratt v. Colt*, in 21 Car. 2. The plaintiff had a judgment against A., and brought his bill against his heir to subject certain lands, which he had a decree of the Court of Chancery for (t), upon a trust for his father and his heirs, to satisfy his debt; and the defendant demurred, and the demurrer was allowed. And the Lord Keeper conceived this all one with *Bennet* and *Box's* case (u), in which Lord Chief Justice Hyde, Chief Baron Hales, and Justice Wyndham were of opinion, on hearing counsel on both sides, that trust lands (x) were not, nor ought to be deemed as assets in equity.

[615]

From the above authorities, it seems clear that uses and trusts

(r) 3 Inst. 19. Hard. 493. Cro. Jac. 513, pl. 23.

(s) Vide *Nevill's case*, 7 Rep. 121.

(t) 1 Ch. Ca. 128.

(u) 1 Ch. Ca. 10.

(x) Vide stat. of Frauds, 29 Car. 2. this remedied. [See ante, 254, of this edition.—Ed.]

were not subject to executions at common law (y), and the circumstance of the case of the king's debtor being universally, in all the cases where it occurs, considered as a case depending upon prerogative, by which the king was privileged not to lose his debt, *wherever his debtor had either the estate or the profits of the estate*, proves as strongly as a series of adjudged cases would do, that the converse proposition holds as to the subject; to which may be added, the statutes actually made to subject *uses and trusts* to the debts and judgment of the pignor of the profits.

Uses and trusts not subject to execution at common law.

The statute of 1 Rich. 3. c. 1. is the first statute which subjected uses to an execution upon a judgment (r).

But uses made so by 1 R. 3. c. 1, now obsolete.

This statute enacted, that every estate, feoffment, gift, release, &c. made or had by any person or persons, and all executions had or made, should be good and effectual to him to whom it was made, against the seller, feoffor, &c. and against all others *having or claiming any title or interest* in the same only to the use of the same seller, feoffor, donor, grantor, &c. or his heirs, *at the time of the bargain and sale, &c.* The statute of 1 Rich. 3. of course became obsolete after the statute of uses, 27 Hen. united the possession and the use.

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But the subsequent revival of uses under the name of trusts called for a further interposition of the legislature, and a clause was introduced in the statute of frauds, 29 Car. 2. c. 3. s. 10. [s. 2. antea of this edit. 254, n. (I).] which pursues the language of the statute of the 1 Rich. 3. as to uses *in respect of trusts*. It enacts, "that it shall be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed at the suit of any person or persons, of, or for, or upon any judgment, statute, or recognizance thereafter to be made or had, to do, make, and deliver execution unto the parties in that behalf suing, of all such lands, tenements, rectories, tithes, and other hereditaments, as any other person or persons be, in any manner or wise, seised or possessed, or thereafter shall be seised or possessed in trust for him, against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said person against whom execution thereafter should be so sued, had been seised of such lands, &c. of such estate, as they be seised of in trust for him at the time of the said exe-

Execution against trusts revived by 29 Car. 2. c. 3. s. 10,

(g) Hard. 488. 495, 496. 3 Ch. Rep. 20. 11 Rep. 92, 93. Dyer, 160, b.

(Y) Uses were first made liable to execution upon a judgment in an express terms by 12 Hen. 7. c. 15, and trusts by 29 Car. 2. c. 3. s. 10.

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discharged of
incumbrances
of trustee.

cution sued; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person as shall be so seised or possessed in trust for the person against whom such execution shall be sued (z). And if any *cestui que trust*

Whether trust
terms attendant
on inheritance
are within 10th
section of stat.
of Frauds.

(Z) Whether trust terms attendant on the inheritance are included within this tenth section of the statute of frauds, is a question of great importance to purchasers and mortgagees. The general opinion is, that they are not; because the words of the section plainly refer to trusts of freehold property only, and not to trusts of leaseholds. Leasehold estates are not expressly mentioned; and there are not any words which can appropriately be made to comprehend them. The word "land" is said by Shepherd to denote "franktenement at the least." Shep. Touch. 92. Technically speaking, therefore, leaseholds cannot be said to be included under the word "lands," for it must be intended when the legislature uses legal terms that it uses them in a legal sense. 3 Madd. Rep. 535. The technical sense of the word "land" is further explained by Sheppard, in his Touch. p. 88, thus:—"If one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple or for life; by this grant shall pass no more but the lands he hath in fee simple."—So in wills, if a man devise "all his lands," and he have both freeholds and terms for years, the freeholds only will pass, notwithstanding the most liberal interpretation is given to the words of wills. *Rose v. Bartlett*, Cro. Car. 493. *Addis v. Clement*, 2 P. Wms. 458, n. and *Thompson v. Lawley*, 5 Ves. 476, and cases there cited. This shews the technical sense affixed to the word "land" to be no other than that given to it by the statute itself, namely, an "hereditament," which terms for years are not. Neither can the word "tenement," as used by the statute, be said to include a term for years, much less can "rectories, tithes, and other hereditaments." These latter words, "and other hereditaments," shew the nature of the preceding interests alluded to, and affix the usual technical sense to the words "lands and tenements," viz. such as are *ejusdem generis* and inheritable, which leaseholds and terms attendant are not. The word "seised" too is applicable only to freehold estates; and though the word "possessed" may refer to leaseholds, yet there is no property of that description previously mentioned to which it can have reference.

Reasons for ex-
cluding them
from this sec-
tion of statute,
continued.

Another reason against including terms for years in this section of the statute may be drawn from a consideration of the consequence of supposing them included. If trust terms are held to be comprehended within this tenth section, then an estate in fee simple, with an attendant term annexed, would, in reference to the judgment creditor, be reduced to a level with chattel interests. For example, if A. be seised of an estate in fee simple, with a term outstanding in his own trustee attendant on the inheritance, then a judgment creditor might, under the statute, extend and sell the whole of the term for the debt of the *cestui que trust*, which would in fact be a virtual sale of the entire estate for the whole beneficial interest therein; when, if there had not been an attendant term, the creditor could have taken but a moiety of the land only under an *elegit*. The numerous titles therefore which are now dependant on terms for years for protection, instead of being the most safe, would become the most insecure and unmarketable titles in the kingdom, and all the laudable anxiety which is now displayed on the part of a purchaser to procure an assignment of the term to attend the inheritance, would be transferred to the object of obtaining a merger of the term, and by that means to relieve one moiety of the lands from judgment debts, since the lands would be then wholly freehold and extendible for one moiety only. But this section of the statute was never meant to include trusts of leaseholds of any kind; for otherwise they would have been expressly introduced, and not left to the mere conjecture of a single judge, whether they should be comprehended in the statute or not. It is scarcely to be conceived, if trust terms were intended to have been included within the statute, that the framers of the act, acquainted as they were with the nature and qualities of terms for years, and of their capacity of being converted into trusts, would have taken so little notice of them, as to have

thereafter shall die leaving a trust in fee simple to descend to his heir, then, and in every such case, such trust shall be deemed

alluded to them by the word "possessed" only—a vagueness of expression implying more carelessness than in common fairness can be imputed to the wording of this statute. See Evan's notes to this statute, vol. i. p. 235.

On the whole therefore we may conclude, that trust terms attendant on the inheritance are not within the tenth section of the statute of frauds, and consequently that they are not liable to be taken in execution by the judgment creditor; and this conclusion is fortified by the decisions mentioned in a former page, see *antea*, 255, of this edition, where authority is adduced for the position, that neither an equity of redemption, nor equitable interests of any kind, engrafted on the legal estate of leasehold property or terms for years, can be taken in execution by the judgment creditor for the debt of the *cestui que trust*; and if a trust of a term in gross be not liable to be taken in execution under the tenth section of the statute of frauds, and if a term assigned in trust to attend the inheritance be a trust of a term in gross, the logical inference is, that a term assigned to attend the inheritance will not be subject to be taken in execution under the tenth section of the statute of frauds. Indeed there would be little occasion to produce reasons why trusts of terms attendant on the inheritance should not be exempt from the liability of attachment by the judgment creditor as well as trusts on terms in gross, if in a late case (*Dee v. Hilder*, 2 Barn. & Ald. 787, cited *antea*, p. 503, n. (A), of this edit.) it had not been made a question whether the tenth section of the statute of frauds, which subjects trust estates of freehold property to the judgment debts of the *cestui que trust*, did not also include satisfied terms for years assigned to trustees to attend the inheritance? No decision on the point has yet been reported. The only ground which would support a decision in favour of the judgment creditor would be, that of considering the term as so annexed to, and attendant on the inheritance, that it is deemed for many purposes as part of it; but this ground, it is conceived, must yield to the force of the preceding arguments.

Presuming then that trusts of attendant terms, as well as trusts of all other leasehold estates, are not affected by this tenth section of the statute of frauds, it may not be amiss in the next place to enquire how this species of trust stood in regard to judgment creditors previously to the passing of that act. At common law, prior to the statute of Westm. the goods and chattels of the debtor were the only funds liable to the claims of the judgment creditor, and there seems no reason to doubt that chattels real, such as leaseholds and other terms for years, fell within the words "goods and chattels," and constituted a fund, when possessed by the debtor, for the satisfaction of the judgment debt, by means of a writ of *fieri facias*. Then came the statute of Westm. and empowered the sheriff to deliver to the judgment creditor all the chattels of the debtor, saving only his oxen and beasts of his plough, and the one half of his land (*medietatem terræ suæ*), until the debt be levied upon a reasonable price or extent. As against terms for years and all other chattels of the debtor, the creditor, it is observable, did not require the assistance of this statute, because, prior to that statute, he could have sold and made the most of such terms and chattels under a writ of *fieri facias*. And Lord Coke, when he says, that by the words "*medietatem terræ suæ*" the sheriff may under the *elegit* extend a term of years, might possibly have not recollected that he was thereby giving the creditor a worse remedy than he enjoyed before at common law. At common law he might have taken the whole lease or term, but under the *elegit* a moiety only. On the authority however of Lord Coke's doctrine and *Fleetwood's case*, 8 Co. 171. (where it was said that the creditor had the option of either extending or selling the term) Mr. Serjeant Williams, in his valuable notes to 2 Saund. Rep. 68 a. seems to consider it settled that the sheriff might extend a moiety of the term, or sell the whole as part of the personal estate to the plaintiff, at a gross price appraised by the jury.

But although a moiety of lands held for a term of years may be extended under an *elegit*, yet the command to the sheriff does not bind the land so as to over-reach the sale, in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in *Fleetwood's case*, *ubi supra*, where it was held, that a leasehold for years

Concluded that trusts of terms are not within 29 Car. 2. c. 3. s. 10.

Judgment creditor may sell term in legal possession of debtor under fieri facias,

or extend moiety of it under elegit.

But though he sue elegit, lien of judgment does not attach till execution.

and taken assets by descent, and the heir shall be liable and chargeable with the obligation of his ancestors for or by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended; "any law, custom, or usage to the contrary, in anywise notwithstanding."

Lands in trust conveyed away between judgment and execution, cannot be followed (A).

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Now, as the liability of lands held in trust to an execution upon a judgment against the *cestui que trust*, depends upon the power vested in the sheriff, by the section of the statute of frauds last-mentioned, it seems it must be confined within such limits as the statute has prescribed to the execution of the power; and as the power is cautiously confined "to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, &c. as any other person or persons be in any manner or wise seised or possessed of in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the same person against whom execution thereafter should be so sued, had been seised of the lands, &c. of such estate, as they be seised of in trust for him at the time of the said execution sued," it is apprehended that no execution can attach under this act, except on lands of which another person or persons be seised or possessed in trust for the person against whom execution is sued AT THE TIME of the said execution sued.

Same.

Thus where A. seised of lands in fee, conveyed them in October, 1682, in consideration of 1270*l.* to B. and his heirs, who was only a trustee for C. and his wife and their heirs. And, by indenture, in December, 1682, between B. of the one part, and C. and E. his wife and their son D. on the other part, it was agreed (z) that B. should stand seised of the pre-

(z) *Hunt v. Coles*, Com. Rep. 226. [Principle acknowledged per Hardwicke, C. in 2 Atk. 107, and so stated by Comyns, C. B. who argued and reported the case. Com. Dig. Execu-

tion, C. 14. But some text writers treat this case, as of dubious authority, (see Gilb. U. by Sug. 77, n. and Sug. V. & P. 401), but without much reason as it should seem.—Ed.]

may be extended on an *elegit* if it is in the possession of the defendant at the time execution is awarded. Mr. Serjeant Hill gave an opinion, that the creditor had a right to sue an *elegit*, and that on an extent sued the title of the judgment creditor would (as in the case of freehold lands) have relation to the time when the judgment was docketed. On the other hand, Mr. Butler thought the word "goods," in the tenth section of the statute of frauds, did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution. And this, on the authority of *Fleetwood's case*, may be pronounced to be the correct statement of the law. Mr. Serjeant Hill's opinion has never been followed in practice.

How judgment may be avoided where the legal estate is in trustees.

(A) It follows therefore that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the *cestui que trust*, will not be bound by a judgment previously entered up against the *cestui que trust*, upon which no writ of execution shall have been sued.

mises to the intent that C. and his wife should take 40*l.* a year for their lives, and that the rest of the profits should be paid to D. and the heirs of his body. The lessor of the plaintiff in ejectment, in Trin. Term, 1695, recovered judgment against D. on a bond. In July, 1699, E. and D. borrowed 600*l.* of G. the defendant, and for a security B., by their direction, mortgaged the premises to the defendant for 500 years. The lessor of the plaintiff in 1714, obtained judgment on a *scire facias* upon the first judgment, and upon this took out execution by *elegit*; and the sheriff, after an inquisition which found that D. was seised in fee, extended one moiety, and delivered it to the lessor of the plaintiff: and the doubt was if he had any title by the statute 29 Car. 2. c. 3. And after argument by Sir Constantine Phipps on one side, and Sir Edward Northey on the other, it was determined by Mr. Justice Tracey that the execution was not good; for the words *at the time of the execution sued*, referred to the *seisin* of the trustee, and therefore if the trustee had conveyed the lands before execution sued, *though he was seised* in trust for the defendant *at the time of the judgment*, the lands could not be taken in execution. And Sir Edward Northey said, that *ever since* the act *such construction* had been thought agreeable to the statute, though he did not know it had ever been judicially determined. And a case was mentioned by Mr. Justice Tracey from Serjeant Cheshire's notes, where this opinion seemed to be allowed by Lord Trevor, and was not contradicted by the court.

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Now, since according to the *express* letter and *judicial* construction of this statute, lands held in trust are only liable to execution on judgments, where the trustee is seised or possessed of them *at the time of the execution sued*, it seems to follow as a *necessary consequence*, that where lands are *in the hands of a trustee* at the time of the sale and conveyance *by the*

Express notice of judgments immaterial, if lands are held in trust for vendor, and conveyance is executed before execution awarded (n).

(B) This is never relied on in practice. A purchaser is always advised to require satisfaction of the judgment to be entered on the records of the court. The maxim on which this doctrine is founded, namely, that equity follows the law, is not universal; for equity in one sense rather corrects and softens the law than follows it; and where rules of equity are opposed to rules of law, the latter must yield to the former. Notice takes away the analogy. The cases at law and in equity are not the same where there is notice. At law it is immaterial whether the party have notice or not. But in the Court of Chancery notice affects the conscience of the party, and a person having notice comes in with inferior equity to the person of whose claim or lien he is informed; and although the purchaser or mortgagee may have the legal estate, yet he has not equal equity, which in similar cases has always been held sufficient to postpone him. The doctrine of the learned author, it is true, receives some support from the circumstance, that not a single instance can be found in the reports where a contrary doctrine has been holden or even advanced, notwithstanding it is a

Doctrine in text doubted.

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*Judgment not a
lien on trust
estate either in
law or equity.*

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cestui que trust, notice of judgments against the *cestui que trust* is immaterial to the title of the purchaser; for judgments are not specific liens upon lands held in trust, such lands are merely liable to execution in the seisin or possession of the trustee of a person beneficially entitled at the time of execution sued out. The statute of frauds has merely invested the sheriff with a power to make and deliver execution unto the party suing, of lands, &c. of which a trustee is actually seised or possessed in trust for him against whom execution is sued at the time of execution sued. If the trust determines before execution sued out, such lands are not liable at law, and consequently not in equity, for equity follows the law; and at common law we have seen that lands in use, or in trust, were not liable to judgments, and they are not subject to execution on a judgment by statute law, unless the trustee of the person against whom execution is sued, be seised or possessed thereof at the time of the execution sued out. It is perfectly clear that an *elegit* could not be executed upon a trust estate sold and conveyed to the purchaser, either by the common law or under the statute; if such lands therefore were liable to a judgment, it must be through the medium of a court of equity by bill for relief, and to subject the lands to the debt in the hands of the purchaser: but there is no ground for equity to give such relief, because the object, in respect of which relief is asked, is not such as a judgment attaches upon as a lien at law or in equity. If the subject were liable at law to the execution, but protected by equity, such court might and does daily give relief; but the subject is not protected from the execution by equity, but is in itself not the object of an execution, having passed out of the seisin and possession of the trustee before execution sued out, into the hands of a purchaser. In this respect it resembles stock or a legacy, neither of which a court of equity will pursue under an execution by way of relief, because they are not the objects of an execution at law. Therefore when a purchaser takes an estate

case that must have frequently occurred. But granting the utmost force of that argument, still a purchaser or mortgagee having actual notice of the judgment, can never be advised to forego the usual requisition of demanding satisfaction to be entered on the records of the court, or requiring an adequate indemnity from the vendor, and when necessary from his surety also. It is necessary to remind the student (what perhaps he might from the preceding observations otherwise confound), that generally speaking trust estates are liable to execution, though in the particular instance stated, that rule may be circumvented without any relief in equity; and note, an equity of redemption cannot be taken in execution for a judgment debt. See *antea*, 257, of this edition, and 563 and 627.

from a *cestui que trust* and his trustee, *before execution awarded* against such *cestui que trust* on a judgment, he thereby acquires that which is *not the subject of an execution* on a judgment against the person of whom he purchased *at law*, nor consequently in equity, and then notice of the judgment cannot be material, since that judgment ceases to attach upon the property, *if it be not* in the seisin or possession of the trustee of him against whom execution is sued out, *at the time when execution is sued out.*

The cases and authorities to which we have last referred, relate to *trusts* of the freehold or inheritance; but it is apprehended that the same principle is applicable to leasehold or chattel trusts, whether we consider them as subject to execution at common law, or under the statutes of Westminster or of frauds; for it seems perfectly clear that execution could only be had of the goods and chattels which the debtor *had tempore executionis*, or the day of the writ awarded, or rather *at the time it is lodged in the sheriff's hands* (a) (c).

Leaseholds affected from time fieri facias is lodged with sheriff.

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And it appears that courts of equity have governed themselves by this rule in cases, where they have interposed to subject property of *this nature*, under the jurisdiction and influence of such courts, to execution.

Same in equity.

Thus, in the case of *Angell v. Draper* (b), the bill was, that the plaintiff had obtained judgment against T. S., for 100*l.* and that the defendant, under the pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of J. S. of great value into his hands, sufficient to satisfy his debt, with a great overplus, and prayed an account and discovery of these goods. The defendant demurred be-

Judgment awarded before he can redeem leasehold in equity must sue out execution at law.

(a) 3 Atk. 739.

(b) 1 Vern. 399.

(C) This is now considered as settled law. Lord Hardwicke said, a leasehold estate is affected by an *elegit* or *feri facias*, from the time it is lodged in the sheriff's hands. *Burden v. Kennedy*, 3 Atk. 738, cited ante, p. 281, of this edition. It is incumbent therefore on the purchaser of a leasehold estate to ascertain that no execution has been delivered to the sheriff; but as the sheriff will not, in many instances, permit his office to be searched, this information can only be obtained by enquiring in the proper courts whether any judgments against the vendor have been recovered. As to an *elegit* of leasehold property, if a creditor is induced to relinquish his right of selling the whole leasehold estate under a *feri facias* (which from the state of the market or other causes he foresees, would be extremely prejudicial to his debtor), and sues out an *elegit* instead of a *feri facias*, the better opinion seems to be, that the general lien of the judgment will not specifically attach on the leasehold estate until the creditor has recovered possession by means of a judgment in ejectment. The reasons for this opinion have been stated at the latter end of a former note, see ante, 617, n. (Z), to which reference is made for more, both on that subject and the subject in general.

Lien of judgment attaches on leaseholds, when.

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For till execution plaintiff has no lien on leasehold estate.

cause that the plaintiff had not alledged that he had sued out execution, and had actually taken out a *fiery facias*; for, until he had so done, the goods were not bound by the judgment, nor the plaintiff entitled to a discovery or account thereof. *Et per curiam*, allow the demurrer: the plaintiff ought *actually to have sued out execution* before he had brought this bill.

So in the case of *Shirley v. Watts* (c), in which a judgment creditor, who had not taken out execution, brought a bill against the defendant to redeem him, who was a mortgagee of the leasehold estate. The Master of the Rolls (Sir William Fortescue) said, the case last stated was a stronger than this, because there seemed to be fraud. In the present case there was not the least suggestion of fraud, the defendant being a fair and *bonâ fide* creditor by mortgage. There was a case of *King v. Marshall*, last Term, upon a bill by a judgment creditor to redeem, which came on before Lord Hardwicke, *when he asked for the writ of execution*; and, upon its being produced, admitted the judgment creditor, for this reason, to redeem. For want of its being taken out now, the bill must be dismissed, because, *till execution*, the plaintiff has no *lien* on the leasehold estate, and decreed accordingly.

Observation on two preceding cases.

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The reader will no doubt have observed, that in the cases of *Angell v. Draper*, and *Shirley v. Watts* last stated, the plaintiffs were unable to enforce their executions at law against the goods in the one case, and the leasehold estate in the other, the same being hypothecated or pledged, and redeemable only by the interposition of a court of equity. It was therefore necessary to apply to a court of equity, on the common equity among creditors of redeeming each other; but though the court admitted the right to redeem, it was clearly held, *in both instances*, that the plaintiffs, in order to entitle themselves to the interposition of the court, must sue out execution, that is, they must first entitle themselves to an execution *at law*, and it was admitted, that when that was done, they would then be entitled to the equitable interposition of the court, to enable them to redeem these chattels, which, beyond the lien of the mortgagees thereon, were the proper subjects of an execution at law, and only protected by the predicament in which they stood from that execution, without the interposition of a court of equity.

No execution of trust of term not in debtor at time of writ awarded.

If these observations are well founded, it is apprehended that the sheriff cannot, at law, execute a judgment upon a term

of years held in trust, unless it be held in trust for the person against whom execution is sued out, *at the time of the writ awarded*; and that if it be necessary to go into a court of equity to assist such execution against a trust estate, the plaintiff in equity must first place himself in that situation which entitles him to execution at law, independent of the equitable predicament in which the object of his execution happens to be placed, and then his success will depend upon his shewing that he is entitled to the equity, which he prays by his bill (D).

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(D) The lien of judgments may be considered, 1st. as it regards the owner, and then 2dly. as it regards a purchaser. As to the owner, a court of equity will never allow him to take shelter under a legal title or other technicality, for the purpose of avoiding his own incumbrance; and therefore, in whatever way the *cestui que trust* may be entitled to the benefit of the term, it will not in equity be allowed to protect him from his own judgment, whilst it will be allowed to protect him and all third persons who have no notice, from judgments and incumbrances not their own, provided such legal estate be created in point of time prior to the period when the lien of the judgments or other incumbrances attached on the estate. And as before the statute of frauds, a court of equity would relieve the incumbrancer from a conveyance to trustees created *mala conscientia* for the very purpose of avoiding the debtor's own judgment, by removing the legal estate so placed in trustees out of the way of the judgment creditor, there appears no reason why the same equity should not still be administered; for the statute has not altered the case, and it is certainly contrary to all equity, that a debtor should retain in his own hands the means of circumventing the perhaps only productive remedy which may remain to his creditor, and there are many instances, where a conveyance to trustees would not be fraudulent within the statute of 13 Eliz. c. 5, (according to the interpretation that statute has received) which conveyance would nevertheless, be sufficient to debar the creditor and incumbrancer from all remedy for his debt or lien; and this relief in equity must have been afforded not only against trusts of freehold, but also against trusts of chattel interests or terms for years, such interests being capable of ownership, and consequently of being clothed with a trust by transfer from one owner to another. This latter doctrine is the more material now, as trusts of terms for years we have seen are not within the 10th section of the statute of frauds, *vide antea*, 604, n. (Z) of this edit. The mode of relief afforded the creditor was, by permitting him to sue out his *elegit* against the inheritance, as if the term or legal estate were merged, and the inheritance brought into possession. But equity, though it removed the term or legal estate out of the way of the creditor as against the debtor himself, considered it still in existence in favour of a *bonâ fide* purchaser or mortgagee, to protect them from debts and incumbrances not their own; and, therefore, there is still a difficulty in the way of relief to a judgment creditor against a conveyance to trustees, where a purchaser or mortgagee has subsequently acquired the legal estate without notice, because such a purchaser or mortgagee has equal equity with the judgment creditor and the legal estate also, and that difficulty is considerably augmented by the circumstance, that no case is to be found in the books where such relief has been granted. 2dly. As it regards a purchaser:—Purchases of the inheritance are divisible into four general classes, 1st. where the whole legal estate is in the vendor; 2d. where the whole legal estate is outstanding in a trustee for the vendor; 3d. where the legal reversion is in the vendor, and a long satisfied term is outstanding in a trustee for him to attend the inheritance; and 4th. where the legal term is in the vendor and the reversion in fee outstanding in a trustee for him. On the first class, the judgment attaches from the time it is docketed by the 4 & 5 W. & M. c. 30, and nothing can affect or defeat it; see *antea*, p. 273, of this edit. note (O). On the second class,

Lien of judgments, as to debtor, on his freehold and leasehold estates.

Lien of judgments when estate is in possession of mortgagee or purchaser.

*Terms for years,
different kinds.*

Chattels real, or terms for years, are of two kinds (E).

First, terms in gross.

Secondly, terms attendant upon the inheritance.

Terms attendant upon the inheritance may again be divided into two kinds.

First, Terms, the purposes of whose creation are answered, and which attend the inheritance by presumption of equity.

Secondly, Terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance.

Terms in gross.

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*Terms in gross
not liable to ex-
ecution on judg-
ment against
reversioner (F).*

1st. As to terms in Gross, or Terms, the purposes of whose creation are not answered, but which are in the condition of bearing fruits, it seems not to admit of a doubt, but that the reversioner or remainder-man, expectant upon the determination of such terms, has, during that state of fructification, no greater or other interest therein, than a mere right to redeem them, on fulfilling the purposes of their creation. Such terms, therefore, are not subject to an execution at common law, on a judgment against the reversioner or remainder-man of the inheritance; because at law we have seen they are considered as separated from the inheritance, and as a distinct and different species of property, the law taking no notice of any ownership distinct from the legal estate; and that they are not liable to an execution, under the statute of frauds, seems a necessary consequence from the decision in the case of *Lyster v. Dolland (d)*, by which it was determined, that the equity of redemption of a mortgage term, is not within that clause of the statute of frauds which relates to judgments. Such terms, therefore, are only subjected to judgments in equity, by virtue of the equity which permits subsequent incumbrancers, and

(d) *Supra*, 339, et vide 1 Ves. jun. 431, and 3 Bro. C. C. 478. 480.

the judgment attaches only from the time of execution sued. *Hunt v. Colles*, *supra*, 618. In the third case, the judgment will attach on the reversion from the time it is docketed but not on the term, provided it be created prior in time to the docketing of the judgment, for the trust of the term we have seen is not within the 10th section of the statute of frauds, and consequently the purchaser or mortgagee may protect himself under the term even if he have notice of the judgment; and vide what is said as to the point of notice, *antea*, p. 621, *in notis*. In the fourth case, the creditor may sell the legal term in his debtor as a chattel under a *fieri facias*, for the debtor has both the legal estate and the beneficial interest in the term; by means of a secondary trust in his favour; and it must be supposed, that the law being so far known to him, he intended by taking the legal estate of the term himself, to subject the term to the lien of his creditor.

(E) See *antea*, 483.

(F) But the reversion of itself may, it seems, be taken in execution, see *antea*, p. 257, of this edition, note (K), and *postea*, 631.

creditors to stand in the place of their debtors, and by redeeming prior incumbrances upon their property, lay it open to an execution, which such court will aid.

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2dly. As to terms, the purposes of whose creation are answered, but which have not been assigned to attend the inheritance, their liability will, it seems, depend on the kind of connection or relation there is between the ownership of such term, and of the inheritance, that forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter.

Attendant terms.

Now we have seen (e), that the connection or relation that subsists between the ownership of such term, and of the inheritance which forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter, where no trust is declared for that purpose, is merely by construction in equity, founded upon the conclusion, that such attendancy is convenient and desirable for the protection of real estates, and to keep them in a right channel, by which means the dominion of them is preserved entire.

Principle of attendancy.

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But it has been observed (f), that the owner may prevent the constructive coalition of the terms and inheritance, if (for any particular purposes) he thinks fit to do so, and keep them as distinct as they were at the creation of the term, by declaring his intention to be so; for such coalition is merely by construction in equity, upon a presumed acquiescence of the owner of the inheritance to that which *prima facie*, appears most for his benefit. But such declaration precludes all ground for construction in equity, and puts the matter entirely upon the footing of the option of the owner, which he certainly has a right to make, as incident to his property and ownership; whether his option is more or less convenient in the end, than that which equity would have presumed for him, is immaterial, for *quilibet potest renunciare juri pro se introducto*.

No constructive attendancy against express declaration.

Now if it be admitted, that the union of the term, and the inheritance in these cases, depends upon the acquiescence of the owner (as it is presumed this must be admitted, because equity, which aims to effectuate, will never make a construction contrary to the declared intent of the parties interested); and if it be likewise admitted, that a trust estate is only liable to execution in the hands of a trustee, at the time of execution awarded, then it seems to follow as a necessary consequence, that the reversioner or remainder-man, expectant on the deter-

Purchaser bound to take in satisfied and unassigned term, protected against judgment of which he has notice. Semb.

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(e) *Supra*, 486.(f) *Supra*, 493. 499.

mination of such terms, together with his trustee, may alien such terms absolutely independent of the inheritance, and that the purchaser thereof will be entitled thereto; and that such terms in the hands of the alienee, will not be subject to an execution, on a judgment against the *cestui que trust*: now if that would be the case, if such terms were aliened for a valuable consideration, separate and distinct from the inheritance, there appears to be no reason why a purchaser for a valuable consideration of such term, and also of the inheritance, should not be protected during the continuance of the term from a judgment, whether he purchased *with or without notice*; because, as to the term, he has purchased a subject, not liable to execution on a judgment at common law, or under the statute of frauds; and there seems to be no equity to induce a court of equity to subject such term in the hands of, or held in trust for, a purchaser for a valuable consideration, to a judgment against the vendor, such judgment being no lien thereon, either at common law, or under the statute of frauds: and as such term is perfectly under the direction of the owner, it seems that if the owner directs it to flow in the channel in which the inheritance is limited by the purchaser's deed, it will become consolidated with, and part of, that inheritance so limited, not so as to merge and extinguish in that inheritance, but so as to continue the benefit of the term to the alienee of the inheritance.

Term never assigned to attend, removed in equity out of judgment creditor's way as against owner, but not as against purchaser, even with notice.

When a judgment creditor takes out execution against a remainder-man, or reversioner expectant upon a term for years resulting, or in mortgage, or in gross bearing fruits, and finds himself impeded by such term, there appears to be an obvious equity in his favour to entitle him to apply to a court of equity, to subject the term to his execution, he redeeming the mortgage or discharging the demands upon it; because in such case, the execution against the term is prevented merely by subsisting trusts with which it is bound, which being discharged, it becomes a trust for him against whom execution is awarded at the time of the writ awarded, and, consequently, an equity arises under the statute of frauds, to subject the term, beyond the charge thereon, to the execution. But if the term be parted with by the person against whom the execution is sued, before execution awarded, so that such term ceases to be the object of an execution at law, where is the superior equity of a judgment creditor to better his case in equity, or to give him any remedy against a purchaser for a valuable consideration, with or without

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notice, that he has not at law, or under the statute, or to change the rights of parties. Why should equity go further than the law? I know of no instance in which it does so. Equity in such case ought to follow the law, and as the plaintiff in judgment could not extend the land in the possession of the assignee of the term holding beneficially, so neither ought he to extend it when he holds in trust for a purchaser of the inheritance. Such term is not shielded against an execution by the interposition of a trust between it and the legal owner, in which cases equity withdraws its protection, but it has ceased to be subject to such execution, having become the property of a purchaser for a valuable consideration, before the judgment creditor had gained a lien thereon by taking out execution.

3dly. As to terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance. It seems reasonable that such terms should not be considered as an obstacle to the execution of judgments against the inheritance, when held in trust for a person who is affected with actual notice; because a trust of a term, which is by express declaration attendant upon the inheritance, is of the same nature with the inheritance. It is a shadow, an accessory to it, for otherwise it could not be attendant upon it. Such a term, and the inheritance on which it is attendant, become consolidated. Such term, therefore, goes with the fee, and is the inheritance itself. Therefore the trustees thereof may be considered as trustees for all incumbrances subsisting on that inheritance, upon which it is attendant, and, consequently, for creditors by judgment pending its attendancy, unless it be in the case of an intermediate purchaser *without notice*, in which case a court of equity will sever such term from the inheritance. And if this be a just view of the nature of a term, attendant by express declaration on the inheritance, it will follow of course, that whoever takes of such trustee an assignment of such term, with express notice of a judgment pending its attendance, takes in truth to that extent, an assignment of a trust estate, with notice of a trust, and, consequently, takes subject to the trust of which he has notice (g).

Purchaser with notice not protected by attendant term.

Sed secus as to term never assigned to attend. Semb.

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(G) A distinction is here made between the protection afforded by a term assigned on an express trust to attend the inheritance, and the protection afforded by a term attendant by construction in equity only, and the latter species of term is considered as having a greater protective quality than the former, inasmuch as it will defend a purchaser even with notice from the attacks of the judgment creditor. The argument inducing this conclusion, depends entirely on the difference which the learned author supposes to exist between the two terms. He considers the one till actually assigned as

Doctrine in text questioned.

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Decree not notice of matters disputed.

To resume our attention to the subject of notice:

A decree made in a court of equity is not implied notice

a term in gross, with all the attributes of that species of term; and the other as an attendant term, with even less qualities than it really possesses. He views the legal operation of the term attendant by construction in equity, without any of its equitable incidents, and the equitable operation of the term expressly assigned to attend the inheritance, without any of its legal effect. The consequence is, that the legal consideration of the one term, is opposed to the equitable consideration of the other. But if in the instance of a term expressly assigned to attend the inheritance, a court of equity will relieve against the maxim at law, "that every term is a term in gross," where the purchaser has notice of the judgment or incumbrance, (though in other cases where the purchaser has no such notice, it will permit that maxim to prevail); then in the instance put by the learned author, of a term never actually assigned to attend the inheritance, but which is nevertheless, attendant by implication in equity, and in fact an attendant term for every purpose,—why should the court depart from its rule, and hold, that a purchaser even with notice shall, in such a case, be permitted to avail himself of the maxim at law, that every term is a term in gross?

On two grounds.

It is submitted in derogation of the argument suggested by the learned author, 1st. that meeting him on his own ground, there is no material difference between a term expressly assigned to attend the inheritance and a term attendant by construction in equity; and, 2dly, that supposing his doctrine correct, it would tend to subvert the original and elementary principles of the Court of Chancery, in regard to notice in general.

No material difference between term expressly assigned, and term attendant by implication in equity.

Terms for years became first attendant on the inheritance solely by construction in equity. The practice of declaring them so attendant, expressly by writing, was an after invention, merely declaratory in so many words of the rule of court; and was, and still is, so far as the attendant quality of the term is concerned, mere surplusage. The term would equally attend and protect the inheritance, as well without an express declaration as with it. The rule in equity is, that when the trusts of the term are satisfied, and the particular purposes for which it was raised, answered, and there is no proviso of ceaser annexed to its original creation, the term shall thenceforth become attendant on the inheritance. *Best v. Stampford*, Pre. Ch. 252. S. C. 2 Freem. 288. This rule is *inter leges non scriptas* of the Court of Chancery. One of the earliest cases wherein it is alluded to is, that of *Attorney-General v. Sands*, 3 Ch. Rep. 37, a case determined eight years previously to the passing of the statute of frauds. And even then, express declarations in writing were not uncommon, as may be inferred from the remarks of Sir Matthew Hale, in *Marsh v. Lee*, 1 Ch. Ca. 162. 166, and 2 Vent. 337,—a case determined about a year afterwards, and seven years before the statute of frauds, where the doctrine of attendant terms, both by express declaration and construction in equity, is treated with a familiarity which implies, that it was long ere then placed among the settled rules of the court. The 7th section of the statute of frauds declared, that all trusts should be in writing, but the succeeding section expressly exempted constructive trusts from the operation of the act; and certain it is, that courts of equity still continue to treat a term for years, the trusts of which have been satisfied, as attendant on the inheritance without any writing to that effect, and will compel the trustee to assign it as the owner of the inheritance shall appoint. If, therefore, says Mr. Gream Hall, in a late ingenious pamphlet, p. 28. "it appears that trust terms were, at the time the statute was passed, and long before, attendant upon the inheritance by construction of equity, and continue to be so construed at this day; and that all terms which exist in this state and are available against dormant incumbrances, were first made attendant by such equitable construction and not by express declaration, and that such express declaration although useful, is not absolutely necessary even at this day, to make them attendant; it may be fairly contended, that they are in effect and character, mere constructive trusts, so long as they continue attendant." In what particular does a term attendant by construction in equity, differ in point of character and actual benefit to the purchaser or mortgagee, from a term expressly assigned to attend the inheritance; but that in the latter instance, the trusts of the term which arise under the rule in equity, have been embodied in so many

to a purchaser of the matter determined, after the cause is ended (g) (H).

(g) 2 Atk. 392.

words? The latter term is precisely what equity had made it before any written description of it occurred, and does not lose its character by being described in writing. It should consequently follow, that the operation of a term expressly assigned to attend the inheritance, should be equally potent in regard to notice, with the effect of a term attendant by construction in equity merely; but the learned author has denied this of the first species of term, and if the second be in character and effect exactly similar, the necessary conclusion is, that the constructively attendant term, will not have any greater power in reference to the subject under discussion, than the term expressly assigned to wait on the inheritance. The distinction then having failed whereon the argument in the text is founded, the deduction drawn from it must also, it is submitted, fall to the ground. But,

2dly. The doctrine, that a purchaser *bonâ fide* with notice of a judgment may, by procuring in a satisfied but unassigned term to attend the inheritance, over-reach the lien of the judgment creditor, is a doctrine which, if admitted, diametrically contravenes other doctrines of the court, equally well settled and acknowledged. Thus, if a first mortgagee make further advances after notice of intervening incumbrances, he will not be permitted to tack them to his mortgage, *antea*, 537. So where there was a mortgage for securing all further advances of which a second mortgagee had notice, and the second mortgagee filed a bill to redeem without paying advances made after his mortgage; Lord Cowper dismissed the bill, saying, it was *the folly of the second mortgagee with notice to take such a security*, *antea*, 545. In like manner, Lord Hardwicke said, in *Moad v. Orvery*, 3 Atk. 238.—“Now to be sure, notice in a court of equity is extremely material; for if a person will purchase with notice of another's right, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will?” The same noble and learned Lord in another case observed, that the taking of a legal estate after notice of a prior right made the party a *mala fide* purchaser; for he knew the first purchaser had the clear right to the estate; and, after knowing that, he took away the right of another person by getting the legal estate; and his Lordship added,—“Now, if a person does not stop his hands, but gets the legal estate when he knows the right in equity is in another, *machinatur ad circumveniendum*, Dig. lib. 4. tit. 3. *Lex* 2; and it is a maxim too in our law, that *fraus et dolus nemini patrocinari debent*, 3 Rep. 78 b.” *Le Neve v. Le Neve*, 3 Atk. 654. On this latter principle, therefore, it is submitted, that the doctrine in the text cannot be maintained; for in all cases where a party has express or implied notice he comes in fraudulently, and even if he has the good fortune to obtain a prior legal term or estate, yet notice will destroy all benefit he may otherwise derive from *that*, reducing his equity below that of the person of whose claim he is informed, and giving to such claimant a superior equity which the possession of the legal estate alone will not counter-balance. And this opinion against the learned author's distinction is submitted with the greater confidence, as it is a distinction not only disregarded in practice, but uniformly opposed by all subsequent text writers on the subject. Thus, Mr. Sugden, after referring to the doctrine proposed in the text, observes, “This is an attempt to establish a new distinction, between a term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity; an attempt which Lord Hardwicke appears to have over-ruled in the case of *Willoughby v. Willoughby*, and it would be very imprudent for a purchaser of an estate in any case to rely on a term of years, as a protection against any incumbrance of which he has express or implied notice.” *Ven. & Pur.* 377. 5th edition.

(H) In *Giffard's case*, 1 Freem. 311, it was made a question, whether a former decree was of itself notice to a purchaser. The case in the text may be considered as deciding this question in the negative. But being present at the hearing of a suit will affect one with notice of the decree which follows. *Harvey v. Montague*, 1 Vern. 57, cited *antea*, 563, the last case in the Editor's note there.

Nothing can destroy effect of actual notice.

Term no protection against incumbrance of which party has actual or implied notice.

Being present at hearing, good notice.

Lis pendens of personally not notice.

There is no case in which equity has determined the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels (*h*) (1).

Registration not constructive notice (*κ*).

If there be several mortgages of lands lying in a registered county, each of them being registered in their proper order, and afterwards the mortgagee *eigne*, having the legal estate,

(*h*) 2 Ves. 244. [The two last references are incorrectly quoted.—What notice is created by a *lis pen-*

dens and decree, is considered at large in a former page and note. See antea, §563, n. (*K*).—*Ed.*]

Act of parliament.

(*I*) And here it may be in order to observe, that a public act of parliament is notice to all mankind; but a private act of parliament is not. *Hesse v. Stevenson*, 3 Bos. & Pul. 565. 578. *Pomfret v. Windsor*, 2 Ves. 480.

Deeds and wills to be registered in what time.

(*K*) By the registry acts it is provided, that all deeds and wills concerning any honors, manors, lands, tenements, or hereditaments, in the county of Middlesex, or in the East, West, and North Ridings of the county of York, or in the town and county of Kingston upon Hull, whereby such hereditaments shall be any way affected in law or equity, shall be registered in offices established for that purpose in the county and ridings above-mentioned; and that every such deed or will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless as to deeds a memorial of them be registered, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim, and unless as to wills a memorial of them be registered within six months after the death of the testator, dying in Great Britain, or within three years after his or her death, dying upon the sea or in parts beyond the seas. 2 & 3 Anne, c. 4. s. 1. 5 Anne, c. 18. 6 Anne, c. 35. 7 Anne, c. 20. 8 Geo. 2. c. 6. In these statutes there is an exception of copyhold estates, leases at rack-rent, and leases for twenty-one years, where the actual possession accompanies the lease; as also of chambers in Serjeants' Inn, the inns of Court and Chancery; and it is declared, that no judgment, statute, or recognizance, shall take effect but from the time of their registry.

Copyholds and leases excepted, but judgments included in registry acts.

Of the memorial.

The memorial is to be written on stamped vellum or parchment; to be under the hand and seal of some or one of the grantors or grantees, their heirs, executors, or administrators, guardians, or trustees, in case of a deed, and some or one of the devisees, their heirs, &c. in case of a will; to be attested by two witnesses, one of whom must be a witness to the deed or will, and must make oath before one of the registrars of the execution of the deed and memorial. The oath is, that the deponent saw the memorial signed and sealed, and the deed to which it refers duly executed. The memorial is to contain the date of the deed or will, and the names and additions of all the parties to such deed, and of the deviser or testatrix of such will, and of all the witnesses to such deed or will, and the places of their abode, and must also express the parcels with the places where the premises lie. And the deed or will, or the probate, or an office copy thereof, is to be produced or left at the office of the registrar, who is to indorse a certificate thereon, which is evidence. In *Eyre v. Dolphin*, 2 Ball. & Bea. 290, it was made a question, whether, in order to constitute such a registration as would, under the Irish registry act (6 Anne, c. 2.), give a deed priority, a certificate that the deed was produced to the officer at the time of registry should be indorsed then, or whether, if indorsed at a subsequent period, it would be sufficient? This, of course, must remain a question till actually decided; but the probabilities are, that an indorsement, at the time of the deed produced, would be considered as a mere formality, and curable, if omitted, by a proper indorsement at any subsequent period. If there be more deeds than one, the parcels need only be specified in one memorial, to which the others may refer; and as a general rule it may be observed, that where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered, cannot insist on the benefit of the statute against a subsequent purchaser without

advances a farther sum of money to the mortgagor, the registry of the intermediate incumbrances will not be constructive

notice, whose conveyance is duly registered, Sug. Ven. & Pur. 603, 5th edit.; and *note*, that a memorial of registry containing the substance of a covenant in a lease, though not expressly setting forth a proviso in it, has been held to be a good registration, the proviso being implied in the covenant. *M'Alpine v. Swift*, 1 Ball & Bea. 285.

If the registry of a deed has been omitted till the subscribing witnesses are dead or not to be found, any of the parties living may re-execute the deed, and sign and seal the memorial in the presence of other witnesses, by which means the deed may be registered; and if the parties themselves are all dead, the heir or legal representative being executor or administrator of any one of them, may execute a memorial, in presence of one of the subscribing witnesses, referring to the deed and stating the death of such party, and then *that* witness may attest the memorial for registry.

The memorial of a will to be binding on subsequent purchasers or mortgagees must, we have seen, be registered within six months after the death of the testator, dying in Great Britain, or within three years after his death, if he die on or in parts beyond the seas. And it is observable, that wills registered within the time allowed by the act will prevail over even a prior registered conveyance; but no time is limited by the act within which a memorial of a will *must* be registered. It may therefore be done at *any* time where there is no adverse title under a prior registered conveyance: and there is no weight, says Mr. Sugden, in an objection which has been lately made that the estate descends to the heir at law, if the will be not registered within the periods above specified. Sug. Ven. & Pur. 596, 5th edit. In case the devisee in a will, by reason of any suppression or contest respecting the will or other inevitable difficulty, without his wilful default, shall be disabled to exhibit a memorial for registry within the time limited, then a memorial of such impediment or concealment must be entered in the registry office, within two years after the death of the devisor, dying in Great Britain, or within the space of four years after the death of the devisor, if he shall die abroad; and a memorial of the will within six months after a removal of the impediment is declared by the act to be a sufficient registry. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator; and it seems, that the registration of wills, probates, and office copies of wills, after the periods directed by the statutes, will be ineffectual to the parties—in the same manner that docketing a judgment after due time will be of no avail.

A memorial of a mortgage will be added in the Appendix, No. XXVIII. It will be proper to notice in the memorial, that the deed was a mortgage for the purpose of rendering intelligible the certificate to be entered in the margin of its being paid off. But this is not required by the act, nor indeed is any other condition, trust, or purport of the deed, required to be disclosed on the registry. This has led some gentlemen to think that a solicitor, who prepares a memorial of a mortgage so as to disclose the nature of the transaction on the registry, divulges the secrets of his clients, and unnecessarily, if not wantonly, exposes the affairs of the mortgagor, without increasing the security of the mortgagee, and it is said, that since the introduction of the object of the mortgage deed on the registry, can give no greater efficacy to the deed than recording it in the precise and contracted terms which the law imposes: it follows that the publicity which is given to it by the mode of registry in practice, is neither incumbent nor justifiable; for that when a purchaser discovers what deeds are executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act. See Rigge on Reg. 57. Sug. Ven. & Pur. 602. and Wils. on Reg. 43. It may however be asked, what end can be answered except that of giving additional trouble, by withholding from the registry the nature of the transaction, when ultimately, it is admitted, the purchaser must become acquainted with the object of the deed? And will not the imputation of disingenuous conduct arise, and engender a suspicion that something more objectionable than a mortgage is attempted to be concealed? But supposing the mortgage paid off, then it is requisite that a certificate of satisfaction should be entered as above

Death of witnesses before registration.

Of registering wills.

Of registering mortgages.

notice, so as to take from him the benefit of protecting himself by his legal title. Thus, where A. lent money on lands (i), the

(i) *Bedford v. Backhouse*, 2 Eq. Ca. Abr. 615, pl. 12. [S. C. 1 Wm. Kel. 5; et vide S. P. antea, 153, of this edition, in *notis.*—Ed.]

stated; but it will appear absurd to add in the margin a note, that the mortgage money has been repaid, when the instrument registered purports to be an absolute conveyance. It is therefore conceived, that the prevailing practice of noticing the proviso for redemption in the memorial of a mortgage, is a perfectly correct mode of registration, and ought not to be discontinued or discountenanced; for the mortgage transaction must ultimately be disclosed, and a frank and candid avowal of the incumbrance is certainly preferable to a slow, and apparently reluctant production of the deed.

Of entering satisfaction thereon.

As to entering satisfaction on mortgages, it is declared by the above acts, that if a certificate shall be produced under the hand of the mortgagee or mortgagees, in such mortgage, his, her, or their executors, administrators, or assigns, and attested by two witnesses, whereby it shall appear that all monies due upon such mortgage have been paid and satisfied, and the witnesses shall upon their oaths before the registrar prove such monies to have been paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his or her executors, administrators, or assigns, the registrar shall make an entry in the margin of the book, wherein such mortgage shall be registered, that the same was satisfied and discharged according to such certificate, and shall file such certificate to remain upon record in the said register office. The registrar will then, on the deed so to be discharged being produced, indorse his certificate thereupon, certifying the discharge of such mortgage pursuant to the directions of the act of parliament.

Certificate does not pass legal estate.

The first registry acts having passed little more than twenty years after the statute of frauds, whereby it is enacted, "that no lease, estate, or interest of freehold, or term of years, or any uncertain interest not being copyhold, shall be surrendered, unless by deed or note in writing, signed by the parties surrendering the same:" there can be little doubt that the mortgage certificate when signed by the parties acknowledging payment and satisfaction in discharge of the mortgage, was intended to operate as a surrender,—which "does not require any technical words, but such only as express the intention," 2 Rol. Abr. 497; and is defined to be "a yielding up of an estate for life or years to him that hath an intermediate estate in reversion or remainder, wherein the estate for life or years may drown." 1 Inst. 337 b. But it is, notwithstanding the general opinion, that this certificate would not divest the mortgagee of the legal estate, and that a purchaser cannot be compelled to accept it, and it is never relied on now, as a note in writing to operate as a surrender must have the appropriate stamp.

Of registering judgments. These bind lands from time of registration only.

The memorial of a judgment is to contain, 1st, the court in which the judgment is obtained, and of what term; 2d, the names and additions of the plaintiffs and defendants; 3d, the sum or sums recovered by such judgment; and, 4th, the day and year on which such judgment was signed; and it is declared that no judgment, statute, or recognizance (other than such as shall be entered into in the name, and upon the proper account of his majesty, his heirs and successors,) shall bind any lands, tenements, or hereditaments, but only from the time that a memorial thereof shall have been duly entered at the register office. This clause is general as to property in Middlesex; but in the East and West Ridings of York, and the town and county of Kingston upon Hull, if the judgment, statute, or recognizance, be registered within thirty days from the time of the acknowledgment or signing thereof, it will bind all the lands of the defendant at the time of such acknowledgment or signing. In the North Riding of York the time is limited to twenty days. But when the judgment is paid off, it is not required that satisfaction should be entered in the margin as in the case of a mortgage. Entry of satisfaction on the records of the court wherein the judgment is docketed will be sufficient.

Deeds of appointment.

Deeds of appointment in execution of powers must be registered if the lands, which are the subject of them, lie in a register county. On this ground a defendant (who claimed under a deed of appointment, and who

mortgage being duly registered; and afterwards B. lent money on mortgage on the same security, and his mortgage was also

admitted that the prior deed of 1742, which created the power, was not registered, and that the deed of appointment was not registered until 1748, which was two years after the registry of the plaintiff's mortgage,) was postponed to the plaintiff's mortgage, which was so registered before the deed under which he claimed. *Scriffton v. Quincey*, 2 Ves. 413.

It is also necessary that liens and charges on the equitable estate, and such as are available in a court of equity only should be registered. Thus, where A. was indebted to one Stanton in a bond for 500*l.*, and being possessed of the premises in question for the residue of a term of ninety-nine years, covenanted, that in default of payment of the said sum of 500*l.*, the said premises should stand as a security for the same; and that he would, on request, execute a mortgage of the said premises, to secure the said sum of 500*l.* This deed was never registered. Lord Northington said, "the priority of the defendant is founded on a latent deed [namely, the said covenant], which ought to have been registered; and from the laches and conduct of those under whom he claims, he has forfeited all priority in this court, and the deed being within the registering act, is void against the plaintiff." *Hennard v. Moore*, 1 Eden. Rep. 327; et vide *Price ex parte*, 1 Buck 221.

Equitable mortgages and charges should be registered.

Leases exceeding twenty-one years, and such as are not at rack-rent, and assignments of them, are within the meaning of the registry acts, and must be registered. On this head it has been determined, that the registry of an assignment of a lease, wherein the original lease is recited, will not be a sufficient registry of the lease itself; for the act says, the deed under which the parties claim, with the witnesses names, shall be registered; and of this a subsequent purchaser can have no notice by the bare registry of the assignment; and it is also required that the original be produced to the officer. *Honeycomb v. Waldron*, 3 Str. 1064; et vide *Williams v. Sorrell*, 4 Ves. 389. Leases which are originally let at rack-rent are considered as continuing so; and they are thereby excepted from the operation of the act, though they may afterwards become valuable leases. Leases not exceeding twenty-one years, where the possession and occupation go along with such leases, are also excepted. An assignment therefore of such a lease out and out to a purchaser who takes possession, is within the words of the exception; for the possession accompanies the lease; but in the case of an assignment by way of mortgage, the possession does not usually accompany the lease, and therefore registration of the mortgage is generally recommended.

Of registering leases and assignments.

In conclusion we may observe, that clerical mistakes do not vitiate the inrolment under the registry act. In a late case it was contended, that a deed was not duly registered, first, because the name of the trustee was spelt "Soden" in the deed, and "Seden" in the inrolment; secondly, because after stating the assignment to be to Seden, his executors and administrators, the *habendum* was to Cowie, his executors and administrators. Sir William Grant however did not conceive that these mistakes annulled the inrolment. No object of the registry act could be affected by either of them: and his Honour observed, that notwithstanding the rigorous exactness which had been required in inrolments under the annuity act (stat. 17 Geo. 3. c. 26), it was held in *Ince v. Everard*, 6 T. R. 545, that clerical mistakes do not vitiate the memorial. In that case the term assigned was of sixty-one years; it was stated to be sixty-two; the consideration was stated to be 280*l.*; but when they came to aver payment of the consideration, the statement was, that the said sum of 280*l.* was really and *bond fide* paid. This last was a more important blunder than that of stating the *habendum* to be to Cowie, as the law said, that such an *habendum* being repugnant was a mere nullity; and then the assignment stated, stood as an assignment to Soden, which was according to the truth of the fact, and would be sufficient without any *habendum*, whereas in the case referred to it was left in a degree ambiguous, whether any such sum as 280*l.* had been actually paid. As to the mistake of a letter in the name of the trustee, Sir William Grant did not see in what way it could operate to disappoint any object of the act, when the substance of the transaction was admitted to be correctly set forth. If search were to be made by an index of names of persons, a mistake of this kind might be of some importance; but the

Clerical error does not vitiate enrolment.

[635] registered, and then A. advanced a farther sum on the same lands without notice of the second mortgage, it was held, by Lord Chancellor King, that the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before (1).

It being a mere formality to give efficacy to deed.

So, in a later case, where W. advanced 800*l.* on a mortgage in Yorkshire (k), and registered it; afterwards K. lent a sum of money, and took a judgment for it, which was also registered; then W. advanced a farther sum, but without any express notice of the judgment; it was argued, on a bill brought by W. to foreclose, that K. ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering K.'s judgment was constructive notice to W., sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgagee, without notice, was to hold till all subsequent incumbrances due to him were discharged.

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Purchaser may search register, but not bound to do so. To prevent further advances judgment creditor should fix prior mortgagee with actual notice.

But it was resolved, that these statutes avoided only prior charges not registered, but did not give *subsequent* conveyances registered, any farther force against *prior* conveyances registered, than they had before; and that to have affected W., K. ought to have given him notice when he advanced his money; for, though W. might have searched the register, yet he was not bound so to do.

(k) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, pl. 7.

calendar to be kept at the register's office was of the parishes, places, and townships, in which the lands laid; and his Honour gave judgment accordingly. *Wyatt v. Barwell*, 19 Ves. 435. For more on registration, see Mr. Rigge's truly useful "Practical Observations on the Statutes for Registering Deeds," and Sug. Ven. & Pur. Ch. XVI. s. 5. and a late publication on this subject by Mr. Wilson, 1819.

Registration not notice to mortgagor of assignment of mortgage, nor to mortgagee of sale of equity of redemption.

(L) And the rule in equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first place. This principle has been held to extend to a mortgagor paying off mortgage-money to a mortgagee, without notice of his having transferred the mortgage; which is a valid payment, although the transfer of the mortgage be duly registered. *Williams v. Sorrell*, 4 Ves. 389. And Mr. Sugden, with great reason conceives, that the rule would apply to a mortgagee, lending a further sum of money to the mortgagor without notice of the sale of the equity of redemption. Sug. V. & P. 607. 5th edit. A purchaser, therefore, of an equity of redemption of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate be in a register county, and his conveyance be duly registered.

This construction of the registering act, appears to me consonant to the general principles of law and equity (M); for, if the second mortgagee had used due diligence, he might have informed himself by the register, who was the prior mortgagee, and by serving an actual notice upon him, effectually secured himself against any farther loan; and therefore this case falls within the common rule, that where, of two persons equally innocent, or equally blameable, one must suffer, the loss shall

Second mortgagee should take a similar precaution.

(M) But not with the spirit and meaning of the act 7 Ann. c. 20, the preamble of which shews plainly that its intention was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. This, it would have been in vain to attempt, if, at the same time, it had been declared, that notwithstanding the registry, no person should be presumed to have knowledge of prior conveyances, unless it could be proved that they had searched the registry; for the same conveyances might then have been equally secret, notwithstanding the act, if a purchaser, on completing his purchase, was not to be deemed bound by all the prior mortgages and conveyances disclosed by the registry. But it seems clearly to have been the intention of the framers of the registry acts, that they should operate as notice to all persons, and be a public repository for deeds to which any person might resort. The only ground on which a contrary doctrine can be founded, is adduced by the learned Author, in the sequel of this paragraph. But Lord Hardwicke, in one case, *Hine v. Dodd*, 2 Atk. 275, is represented to have said, that the register act was intended to give notice to the parties, and notice to every body; and that the meaning of the statute was to prevent parol proofs of notice or not notice. That case, however, did not at all turn upon the point under discussion, and therefore there was no express decision that the statute was in itself notice. Rigge on Reg. p. 39; and it is observable that that construction has never since been recognized, nor was it ever before adopted. Lord Camden, indeed, said, if it were a new point, it might admit of difficulty; but the determination in *Bedford v. Backhouse*, seemed to have settled it, and it would be mischievous to disturb it. The act provided for one single case only, that was, to make unregistered deeds void against registered deeds; but there was no provision by the act, in a case where all the deeds were registered. And yet it became a serious question whether a court of equity should not say, that in all cases of registry, which was a public depository for deeds, and to which any person might resort, a subsequent purchaser ought not to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law. [As to this however, see antea, 550 and 596, of this edition.] It was a point in which a great deal of property was concerned, and was a matter of consequence. Much property had been settled, and conveyances had proceeded on the ground of that determination. In the case of *Vandeubendy*, in the House of Lords, the doctrine about dower prevailed, because it had been practised in a course of conveyancing. A thousand neglects to search had been occasioned by that determination, and therefore Lord Camden could not take upon himself to alter it. If it were a new case, he should have had his doubts; but the point was closed by that determination, which had been acquiesced in ever since. *Morescock v. Dickens*, Amb. 678. It may therefore be considered as settled, that the statutes do not operate to give every person notice of the will, conveyance, or incumbrance recorded; and that a person having the legal estate, is not bound to search the registry for incumbrances created prior to the time of his becoming seised thereof. But to return to the text; where the culpability is thrown on the second mortgagee for not having searched the register and fixed the first mortgagee with actual notice of his incumbrance, *dehors* the register; but the second mortgagee, it should be observed, is not blameable for omitting to search (a fault, if any, of which the first mortgagee, stands equally chargeable), but for not giving notice to the first mortgagee, whose incumbrance he might, by means of the register, have easily discovered.

Registry acts intended to be notice to all the world.

be left with him on whom it has fallen. The second mortgagee having no more claim to equity than the first, the former will be left in possession of the benefit the law gives him, of protecting himself by the legal estate.

*Notice of an
unregistered
mortgage, bind-
ing (n).*

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But a subsequent mortgagee (l), having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he should have. As, where N., in 1718 (m), married his first wife, and, on the marriage, a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, and her personal estate, to be settled on trustees, in trust, for N. for life, then for his intended wife for life, remainder to the issue of the body of N. by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, N. married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 Queen Anne, cap. 20, which requires registry. The first marriage articles and settlement were never registered;

(l) [*Doe v. Routledge*, Cowp. Rep. 712, et vide S. L. per Lord King, in *Blades v. Blades*, 1 Eq. Ca. Abr. 358, pl. 1 & 2.—Ed.]

(m) *Le Neve v. Le Neve*, 1 Ves. 64.

3 Atk. 646. [*S. C.* Amb. 436.—Ed.] Et vide *Cheval v. Nichols*, 8 Tra. 664. [*S. C.* 2 Eq. Ca. Abr. 63.—Ed.] Et *Sheldon v. Cox*, Amb. 674. [*S. C.* antea, 593, and 2 Eden, 224.—Ed.]

*Against regis-
tered convey-
ance actual no-
tice only will
avail; lis pen-
dens not suffi-
cient.*

(N) But to affect a registered deed by notice of a prior unregistered deed, actual notice must have been given and clearly proved. A registered deed stands upon a different footing from an ordinary conveyance. It has been much doubted, whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, "we cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected." But even under this limitation, the security, derived from the register, is considerably lessened; as no one can with certainty tell what circumstances may, truly or falsely, be given in evidence; or what judgment a court will form as to the effect of the evidence in any particular case. It is, however, only by actual notice [of the unregistered deed] clearly proved, that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose. *Wyatt v. Barwell*, 19 Ves. 439. Hence, therefore, where a deed has been registered, constructive notice by other means than by the register, will not be sufficient; there must be actual notice, and then the subsequent registration, so far as it is done with an intent to obtain priority of the previous unregistered instrument will amount to fraud.

the second were. N. also mortgaged this estate, as absolute owner thereof. *Le Neve v. Le Neve.*

The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered.

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The ground of this application was, that the agent, who made the last settlement, had notice of the first. And, notice to the agent having been fully made out, the principal question was, whether it would affect the defendant's purchase, and oblige the Court to postpone the second articles and settlement to the first, notwithstanding the registering act.

And the Court determined it would; for the intent of the act was to secure the subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance (O).

Construction of 7 Anne, c. 20.

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of *Lord Forbes v. Denison*, which arose in Ireland (N) (P).

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(a) Cited in last case, 1 Ves. 67. The same case is mentioned in Lord Harcourt's MS. Tables.—Ed.]

(O) The words of the report are remarkable. They are the following: "The enacting clause says, that every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, &c. that is, it gives them the legal estate, but it does not say, that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger where he knows of another incumbrance, because he might then have stopped his hand from proceeding." 3 Atk. 650.

Extract from report.

Every case on the registry acts, both in England and Ireland, which has been brought before a court of equity, has been determined on this ground, that these acts do not affect the great fundamental principles of equity; but that every purchaser claiming under a registered deed, is left open to any equity which a prior purchaser or incumbrancer may have. *Chandos v. Brownlow*, 2 Ridgw. P.C. 428.

Registry acts do not affect rules in equity.

(P) This case arose, as the author states, on the Irish register act, which is general. It was to the following effect:—G. being tenant for life, with remainder to his first and other sons in tail, with power to himself to let the premises on leases for lives, granted a lease for three lives, which

Unregistered lease, with notice, binding on subsequent purchaser.

Suspicion of
notice not
enough (q).

But though apparent fraud, and *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones (o), *suspicion* of notice, though a *strong suspicion*, was held by Lord Hardwicke *not* to be sufficient to justify the Court of Chancery in breaking in upon this *act of parliament*. And therefore, where a mortgagee (p), of lands in Middlesex, swore in his answer, that, to *his belief*, he did not know of a judgment, which had not been registered until

(o) *Vide Jolland v. Stainbridge*,
3 Ves. 478, the evidence of notice
ought to amount to actual fraud (R).

[S. C. Barn. 256, and recognized by
Lord Manners, in 2 Ball & Bea. 301.
—Ed.]

(p) *Hine v. Dodd*, 2 Atk. 275.

was not registered. He afterwards agreed with F. his eldest son, by the agency of one S. to sell him his life estate, upon F.'s paying his father's debts, and securing other payments; and the estate was accordingly conveyed to trustees for F., and the conveyance was registered. The trustees having brought an ejectment against the lessee, he applied to the Court of Chancery; and, upon proving that S. who was F.'s agent, had notice of the lease during the treaty for the purchase, Lord Middleton, C. awarded a perpetual injunction against F. and his trustees. From this decree there was an appeal to the Irish House of Lords, where it was reversed as to part, the injunction being restrained to the life of G., because the lease was not got under the power; but, as to the principal point, the decree was affirmed. This appears to have been an extremely well considered case, both by the Chancellor and the House of Lords. The House of Lords determined that the words of the act, which made an unregistered deed fraudulent and void against a subsequent registered deed, had not that effect if the party had notice of the prior deeds; for if a man had notice, he could not say he was defrauded; it was fraudulent in him to take a conveyance to defeat the charge of another. See Sch. & Lef. 100. This case was followed by that of *Chesall v. Nicolle*, before Lord C. B. Gilbert (2 Eq. Ca. Abr. 63, pl. 7. 1 Str. 664), where it was held, in conformity to the case of *Forbes v. Denison*, that a person having notice of a prior incumbrance, could not impeach it for want of registry. Then came *Bestniffe v. Smith*, 1 Eq. Ca. Abr. 357, pl. 11; but that case does not fully decide the question, as it turned considerably on the fraud, which was inferred from the plaintiff's concealing the articles. This case arose on the Middlesex registry act. Then followed the case of *Blades v. Blades*, in 1 Eq. Ca. Abr. 358, pl. 12, on the Yorkshire registry act; and there Lord King decreed against the words of the act, on the ground that the party had notice of the first purchase, and then the procuring of his own deed to be registered first, was a fraudulent act. This case also resembles that of *Forbes v. Denison*, but is a much stronger case.

Suspicion of
fraud not notice
thereof.

(Q) So mere suspicion of a fact arising from opinions in the abstract, &c. will not support an objection to the title by a purchaser, *M'Queen v. Farquhar*, 11 Ves. 467; nor will mere suspicion of fraud amount to constructive notice of the fraud. Thus, the mere circumstance of the father first contracting to sell the estate, and then appointing to a child who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to shew that the son was not to receive a due proportion of the money. *M'Queen v. Farquhar*, ubi supra.

Proof of notice
by parol.

(R) That is when a person takes with actual notice of another's right, he is considered as coming in fraudulently, and as the fraud arises from the notice, the evidence of notice should be clear and explicit, which it seems may be proved by parol; but Lord Alvanley observes, "I regret that the statute has been broken in upon by parol evidence, and am glad to find Lord Hardwicke, in *Hine v. Dodd*, says, nothing short of actual fraud will do." *Jolland v. Stainbridge*, ubi supra.

after his mortgage executed; this was contradicted by *one witness only*, who swore, that, on a conversation at which she was present, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, at the same time, that was not registered, and what were acts of parliament for, unless they were effectually observed?" Lord Hardwicke said, that, undoubtedly, this was *material* evidence, but then it was only *one* witness against the answer of the defendant, and the evidence amounted merely to a defendant's *confession* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordship, therefore, dismissed the plaintiff's bill as to this part of the case.

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I have not met with any case wherein it hath been determined that a *puisne* mortgagee, where there are several incumbrances registered, shall protect himself, by purchasing in an *eigne* incumbrance, which brings with it the legal estate; but that case seems to fall within the same reason as the last. It is evident from the preamble of the 2d & 3d Anne, c. 4, that the object of the legislature in that statute (which laid the foundation of the subsequent registering acts) was to enable mortgagors to give such satisfactory security to monied men, as would induce them to advance their money, on landed security, to persons in trade, which it was thought would tend to the national benefit. The mode adopted by the legislature to affect this purpose, was, to secure them against prior claims, by establishing a register, where all incumbrances that affected the estate might be seen; and by giving securities registered, though posterior in date, a priority: but it was not necessary to alter the law, as to the priority amongst incumbrances registered; for, if a mortgagee neglects searching the registry, he ceases to be an object of legal favour; and, if he searches, and, notwithstanding there be an incumbrancer prior to his, lends his money, he takes the equitable estate *only*, with notice, and, having voluntarily accepted it, of course becomes liable to the incidents and contingencies to which that kind of security is, in its nature, exposed. The true construction of the act therefore seems to be, that it has left mortgagees, whose incumbrances are registered, in the same situation, as to each other, as they were previous to these statutes. In which case, the *puisne* mortgagee, having purchased in the first incumbrance, would

Three incumbrances registered, *puisne* mortgagee purchasing first gains priority. Semb.

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have been entitled to a priority; he having the best title in law, and as much equity as the *mesne* mortgagee (s).

Exposition of registry acts.

No difference between actual and constructive notice. Third mortgagee may purchase first, notwithstanding second be registered.

Devisee of equity of redemption must pay advances to heir, if will not registered in time. *Sed qu.*

Registered equitable incumbrance may be prejudiced by subsequent incumbrancer purchasing prior legal estate.

(S) Of this there can be little doubt. Lord Camden has said, that the acts do not provide for cases where all the deeds are registered. They apply only to make unregistered deeds void as against registered deeds and incumbrances, *Morecock v. Dickens*, cited *supra*, 636, in *notis*, and per Lord Northington, the statute of 7 Ann. c. 20, was only intended to protect purchasers against secret conveyances: it did not affect the question of notice: it left that as if the statute had never been made. *Sheldon v. Cox*, 2 Eden, 228. In short, the hypothecated case in the text has received an express decision by the assent of Lord Loughborough in *Cator v. Cooley*, 1 Cox, 182, where the plaintiff, being a third mortgagee without notice of the second mortgage, afterwards bought in the first mortgage, and brought his bill to foreclose the second mortgagee, unless he would redeem both the plaintiff's mortgages; and the single question was, whether the register of the second mortgage (the lands being in Middlesex) was of itself such a notice as would affect the third mortgagee; but the counsel for the defendant admitted the point to be so well decided, that such register would not be sufficient without actual notice, that the contrary could not then be maintained; to which the Lord Chancellor assented, and decreed accordingly.

But it seems that if a devisee omit to register the will, and the heir at law takes possession of the estate for want of registry, and procures a further charge to himself, which is tacked to a subsisting mortgage of the property, the devisee, if he can afterwards procure the will to be registered within the five years, will not be allowed to redeem the mortgage without paying also what was advanced to the heir; at least this was Mr. Ward's opinion (see 2 Cas. & Opin. 43), and many arguments present themselves to recommend it; but the observations of Mr. Sugden, cited in a former note, have a contrary tendency. See note (K), *antea*, p. 619, of this edition.

It remains to be considered, whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance which was duly registered previously to his purchase. Lord Camden decided that he should not, in *Morecock v. Dickens*, Amb. 678, for that the registry of the equitable incumbrance was not notice. Lord Camden's decision in this case has been questioned, chiefly on the ground that *Bedford v. Backhouse*, *supra*, 634, (on which his Lordship's determination was entirely founded), was not an authority in point, the case before him raising in every respect a new question. It is, however, submitted, that the solution of the question depends wholly on the construction of the registry acts, in regard to the effect of registration of the equitable incumbrance. Is the registration of an equitable charge or conveyance to raise presumptive notice to all the world in the teeth of repeated and unanimous decisions, that the registration of conveyances of the legal estate, or of incumbrances creating legal liens, shall not operate as notice? We have seen that the registry acts have left the doctrine of notice untouched, and without notice, it is clear a subsequent purchaser of the legal estate may over-reach a prior equitable incumbrancer. But then, it is said, "*Morecock* had no means whatever of giving notice of his equitable incumbrance to *Dickens*, who afterwards acquired the legal interest. *Dickens*, on the other hand, might have searched the registry, and thereby have been apprised of the prior equitable charge." This is certainly true, but the same argument would apply in deterioration of acknowledged law, in respect to the docketing of judgments, and the inrolment of bargains and sales, which could not be tolerated. A judgment creditor has no means of giving the subsequent equitable incumbrancer notice of the judgment, *alias* the docket; yet the equitable incumbrancer by searching the docket may discover the judgment. The equitable incumbrancer may, however, purchase in a legal estate created prior to the judgment, and so over-reach the lien of the creditor. The best answer to the equitable incumbrancer is, that if he is so badly advised as to take an equitable security, he must run the hazard of other persons purchasing the legal title and thereby acquiring a preference to him. The observations in derogation of Lord Camden's decision are addressed to the case of a purchaser not having the legal estate at the

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title deeds if he

Mortgagee not obliged to discover title deeds

time of his contract (Sug. Ven. & Pur. 611, 5th edit.), but who, after his own and the previous equitable incumbrance has been registered, obtains a conveyance of the legal estate, which it is presumed is also to be considered as duly registered. Removing notice out of the case, no objection is taken to the priority claimed by the subsequent purchaser, but it is said he entered into his equitable contract with full notice of the preceding equitable incumbrance, and should therefore be postponed to its payment. This, it is presumed, is the whole amount of objection; though not so expressed in as many words. But how has the second purchaser notice of the prior equitable charge? In no other way than by its registration, which we have seen is not constructive notice. It is submitted, therefore, that few substantial reasons occur for invalidating the decision in *Morecock v. Dickens*, *ubi supra*.

But the point does not rest upon opinion. Lord Redesdale has expressly acknowledged and confirmed the doctrine laid down by Lord Camden, in a subsequent case (*Bushell v. Bushell*, 1 Sch. & Lef. 90); and although in that case it may be said that Lord Redesdale was not called upon to decide the question, and that therefore his opinion was extra-judicial (see Wils. on Reg. 70), yet it must be remembered that the very question before his Lordship was, whether the registry of articles made prior to a settlement, under which the defendants claimed, did not make them come in as purchasers under the settlement with full notice of those articles; on the ground that the registry of a deed was notice to all the world of the existence of such deed and of its contents, so far as such contents were developed in the memorial? Lord Redesdale however was clearly of a contrary opinion, viz. *that registry was not notice*, and consequently that notwithstanding the registry, the persons who took the legal estate under the settlement had undoubted priority to those who supported equitable claims under the articles. But his Lordship made this distinction between the English and Irish acts:—By the 4th section of the Irish act (6 Anne, c. 2) it was declared, that every deed or conveyance, a memorial whereof should be duly registered, according to the rules prescribed by the act, should be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial. Thus, it was expressly enacted, that, whatever might be the nature of the instrument, priority in time of registering, would give it priority of operation both at law and in equity. But this clause was not in the English acts; and his Lordship said he had no sort of doubt of the true construction of the act in question (namely, the Irish act). The instrument registered must prevail against a subsequently registered instrument, by force of the clause in the 4th section, viz. that being an instrument which affected lands, it should be good, not only at law, but in equity, according to the priority of registry. This was not at all grounded on the next section of the act, which avoided unregistered conveyances; that, was a provision of a totally different description. The meaning of the former clause was to give full effect by force of the registry, even to articles, if registered, against a legal conveyance: so that the act had given to contracts registered a force and effect in Ireland, with respect to lands themselves, which they had not in England, there being no such clause in the English registry act. This, his Lordship took to be the true meaning of the act, as far as he could collect; and would answer all the purposes of every decision on the subject. On that interpretation of the Irish act, Lord Redesdale decided that the articles had acquired a priority by being registered; and therefore that the persons claiming under them were entitled to preference.

And this doctrine has been acknowledged and acted on by Lord Manners, in *Eyre v. Dolphin*, 2 Ball & Bea. 299, where an equitable claimant urged, that the same right in equity which he had against the mortgagor and his representatives, was available against the mortgagee, who took a mortgage of the property in 1780, on the ground, that a prior settlement in 1745, out of which the claimant's equitable title arose, was duly registered. Lord Manners said, if the deed of settlement were duly registered, the question was at an end; for the plea of a purchaser for valuable consideration without notice, could not avail against a prior duly registered deed; and whe-

That doctrine confirmed.

English and Irish registry acts distinguished.

Registered deed of equitable estate, preferred in Ireland to subsequent registered deed of legal estate. Contra in England.

Priority of title regulated by time of registry under Irish acts.

If he denies notice (qq).

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denies notice (q). For, if a plaintiff brings his bill to redeem ever so strongly, he is not entitled to see the mortgagee's

(q) *Senhouse v. Earle*, 2 Ves. 450. (qq) [Except the purchase deed. *Perrat v. Ballard*, 2 Ch. Ca. 73. Ibid. Redesd. Tr. Pl. 219.—Ed.] 135, 136. 1 Vern. 27.

Mischief of considering registration, notice in every event.

ther the plaintiff's title were a legal or an equitable title, it would have priority from its registration, whether the mortgagee had notice or not.

In the course of his judgment in *Bushell v. Bushell* (1 Sch. & Lef. 103), which was delivered after three months consideration, Lord Redesdale entered minutely into all the cases that had been decided on the English registry acts, and observed that the effect of all the decisions was, that registration could not be considered as notice, with all the consequences that would attach upon it as notice. If it were so considered, it would lead to very mischievous consequences. It was true that registry was considered as notice to a certain extent; no person thought of purchasing an estate without searching the registry; and, if he searched, he had notice: but his Lordship thought it could not be considered as notice to all intents, on account of the mischiefs that would arise from such a decision. For if it were to be taken as constructive notice it must be taken as notice of every thing that is contained in the memorial: if the memorial contained a recital of another instrument, it would be notice of that instrument—if of a fact, it would be notice of that fact.—These observations of Lord Redesdale were certainly gratuitous as to the English acts; but, considering the extent of investigation which his Lordship pursued, and the very able manner in which he pronounced his judgment, they are not the less sound or the less entitled to respect on that account.

Same.

In another case Lord Redesdale observed, that if registry be considered notice, it must be notice, whether the deed be duly registered or not: it may be unduly registered; and, if it be so, the act did not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites. *Latouche v. Dunany*, 1 Sch. & Lef. 157. And in a later case the same noble Lord observed, that it seemed to him that nothing could be more mischievous than to hold that the putting any thing on the registry should be notice within the meaning of the word "notice," as applied to courts of equity in such cases; and that, on conversation with Lord Kilwarden, Lord Redesdale found (notwithstanding what had been urged to the contrary) that he (Lord Kilwarden) was impressed with the same opinion, though the common language of the court led to an idea that it was notice. The words of the [Irish] act gave priority to instruments, whether they conveyed a legal or only an equitable title according to the priority of their registry; but still, according to the rights, titles, and interests of the persons conveying; and that there was this important difference between actual notice and the operation of the registry act:—Actual notice might bind the conscience of the parties; the operation of the act may bind their title, but not their conscience. *Underwood v. Cowertown*, 2 Sch. & Lef. 64. And in his place in the House of Lords, Lord Redesdale maintained the same opinion, observing, that the effect of registration was different in Ireland from what it was in England, as in Ireland the effect of registration was to give a preference, both at law and in equity, against all subsequent deeds whatever. *Daly v. Kelly*, 4 Dow. Par. Rep. 436. Accordingly, Lord Manners, in *Pentland v. Stokes*, 2 Ball & Bea. 75, held clearly, that the registry of a deed in Ireland gave priority, but did not affect a party with notice.

Difference between actual notice, and operation of registry act.

Tacking not allowed under Irish registry act.

Tacking is not allowed under the Irish registry act; and this arises from the peculiar wording of that act, and the construction it has received. The meaning and intention of the act was to secure persons taking charges upon estates; to provide that they should have that to resort to, which would enable them to take with more security. Now tacking does tend most strongly to prevent purchasers (in which description mortgages are included) from being so secured, because by its operation all intermediate encumbrances are to be prejudiced; they cannot be secured unless the effect of the act be to require all instruments affecting the estate to be brought by proper memorials upon the registry. The provisions of the act seem intended to enable a person dealing with an estate to say, "All instruments that can have effect against me are brought on the registry, and

title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice (T).

none which are not there can be brought against me." This necessarily excludes tacking; for that is giving effect to an instrument which a person is not enabled by means of the registry to discover: and the manner in which the act is framed, shews, that such was the idea of the legislature. *Latsche v. Dunany*, 1 Sch. & Lef. 159. In the same case it was said, that the effect of the 5th section of the same act was to give judgment creditors not only the priority which they would before have had against the registered deed, but a priority against the unregistered deed, which they had not before, and that for the sake of the registered deed; for the several incumbrances could not otherwise be arranged for the benefit of the registered deed.

Priority of judgments under same act.

From these remarks on the registry acts we collect, 1st, that registration is not notice; 2d, that a mortgagee having the legal estate may tack further advances to his security, notwithstanding a mesne mortgage may have been duly registered; 3d, that an equitable incumbrancer, without notice *anted* the registry, may over-reach a prior equitable and registered mortgage, by purchasing in a legal estate created previously to both incumbrances; 4th, that actual notice of an unregistered deed will bind the party to whom such notice is given with the incumbrance created by it, notwithstanding his own incumbrance be duly registered. But 5th, that, these positions are in effect the very reverse in Ireland, on the ground, that the Irish registry act declares that every deed in Ireland shall have priority according to the time of its registration.

Recapitulation.

(T) In *Chandos v. Brownlow*, 2 Ridgw. Par. Ca. 422, it was held, that a purchaser for valuable consideration without notice, having the legal estate in him, can always defend himself in a court of equity, whether the bill be filed against him for discovery or relief, and whether the prayer of that discovery or relief be founded on a right derived from particular contract, from the common law, or from positive and explicit provisions of a statute. This, Lord Chancellor Fitzgibbon considered to be clear, on a broad principle, as old as the institution of a court of equity, a principle which did not admit of exception, which had not been shaken for more than a century, and could not be questioned without shaking to its foundation the whole system of equitable jurisprudence, which had been defined and established by the collected wisdom of ages. This rule is general, extending to every purchaser for valuable consideration without notice of the plaintiff's title; and the reason of it is, that a purchaser without notice is not bound in conscience to assist the right owner in the legal recovery of the subjects purchased under such circumstances, *Hoare v. Parker*, 1 Cox, 227; and the assignee of a mortgagee or purchaser for a valuable consideration without notice, is entitled to the same protection. *Sweet v. Southgate*, 2 Bro. C. C. 66. S. C. 2 Dick. 671. *Lowther v. Carlton*, 2 Atk. 139. 242. S. C. Ca. temp. Talb. 186. Barn. 338. Et vide cases on same rule, in 8 Vin. Abr. 546, and *Hardy v. Reeves*, 5 Ves. 426, where a debtor claiming as mortgagee, denied notice of the plaintiff's title, which was neither set forth nor proved; an inquiry, with a view to affect him with notice, was refused, first, upon a petition to vary the minutes, and again upon a rehearing; but an inquiry was granted as to what money he had advanced on the security.

Assignee of purchaser not obliged to discover deeds.

It frequently happens that a person has a title to an estate from which he is debarred by reason of the documents and papers respecting it being detained by another. We propose to consider his remedy, first, at law, and then in equity.

Of obtaining possession of title deeds.

In a court of law an action of trover may be maintained for title deeds after demand and refusal, *May v. Harrey*, 13 East, 197, provided the plaintiff can prove a right of property and a right of possession to the same. *Gordon v. Harper*, 7 T. R. 9. Thus, where A. having agreed to purchase of B. the remainder of a term, and the latter delivered to him the lease, in order that he might get an assignment made out; and A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because B.'s under

In an action of trover.

*Recital of deed
by date and
parties, notice*

Thus, where a plaintiff's bill was to set aside a conveyance made to the defendant by A., on the ground that the defendant

tenant had removed some fixtures. It was held, that B. might insist on A.'s accepting the assignment, and after demand and refusal of the lease, might maintain trover for it. *Parry v. Frame*, 2 Bos. & Pul. 451. And it has been held, that the person who is entitled to the land has a right to the title deeds of that land, *Hooper v. Ramsbottom*, 6 Taunt. 14; and therefore where A. sold an estate to B., who paid part of the purchase money, and the title deeds were deposited with C. as an escrow, to be delivered up to B. when he paid the residue of his purchase money; and A. obtained possession of them again, and pledged them to D. for a valuable consideration; it was held, that B. on tendering the remainder of the purchase money, was entitled to recover the deeds from D. *Hooper v. Ramsbottom*, 1 Marsh. 414. But to entitle the plaintiff to recover, he should have a better right to the deeds than the defendant: and if in the assignment or conveyance there be no grant of deeds to him, he cannot recover. In *Yea v. Field*, 2 T. R. 708, a purchaser of a small part of an estate took a covenant from the vendor, that he (the vendor) would produce the title deeds whenever it should be necessary. The deeds afterwards came into the vendee's possession, on his taking a mortgage of the other part of the estate, and he then assigned the mortgage to a third person, not mentioning the deeds. Such third person, it was held, could not maintain trover against the vendee for the deeds. And trover lies for an unstamped agreement, if it can, upon payment of the penalty and stamp duty, be stamped and rendered available. *Scott v. Jones*, 4 Taunt. 865. So also a vendor may maintain an action of trover for the abstract and other documents of title delivered to the purchaser, if the purchase goes off, *Roberts v. Wyatt*, 2 ibid. 268; and note, in trover for a bond the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should set out the date, and mistake it, he would fail in his action. Cro. Car. 262. If the defendant find the bond, and receive the money, an action of account will lie against the receiver, and not trover. Cro. Eliz. 723.

*Attorney will
be ordered to
deliver up
deeds, when.*

If deeds or writings come to an attorney in the way of business, and he afterwards detains them, the court of common law, of which he is an officer, will, on motion, make a rule upon him to deliver them back to the party, on payment of what is due to him; and particularly when he has given an undertaking to redeliver them. *Anon.* 1 Salk. 87; et vide 1 Chit. 98. Say. Rep. 125. *Strong v. Howe*, 1 Str. 621. S. C. 8 Mod. 339. And when something is to be done for which a *mandamus* would lie, as the giving up of court rolls, &c. the court will entertain a summary jurisdiction over an attorney, in obliging him to deliver up the deeds on satisfaction of his lien: and, if a third person appear to be interested therein, the court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person. *Hughes v. Mayre*, 3 T. R. 275. and see *Marshall's case*, 2 W. Bl. 912. *Grubb ex parte*, 5 Taunt. 206. *Corpus Christi Coll. ex parte*, 6 ibid. 105. But, in general, where writings come to the hands of an attorney, in any other manner than in the way of his business as an attorney, the party must resort to his action. *Anon.* 1 Salk. 87. And accordingly in a late case (*Cox v. Harman*, 6 East, 404. S. C. 2 Smith's Rep. 409) the court refused to proceed summarily against a steward who was an attorney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and deliver up on oath all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a *mandamus*, to compel a steward of a manor to deliver up court rolls, &c. So the court will not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease, put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *Low v. ex parte*, 8 East, 237. Nor will the court make an order on an attorney to deliver up a deed, which he holds as party and trustee. *Grubb ex parte*, ubi supra. And where an attorney had deeds, &c. in his custody, of two co-defendants, the Court of Common Pleas would not refer it to the prothonotary to ascertain to which of them he should deliver the deeds on his

was no real purchaser (r), or, if he were, yet, before his purchase, he had notice that the estate was subject to a trust for the plaintiff, and that a lease in the defendant's custody mentioned it; the defendant swore himself a purchaser without

of trust contained in that deed.

(r) *Hall v. Atkinson*, 1 Eq. Ca. Abr. 333, 4. [S. C. 2 Vern. 463, et vide supra, 586.—Ed.]

paying the attorney's debt and costs. *Duncan v. Richmond*, 7 Taunt. 391. 8. C. 1 Moore, 99.

It is also observable, that if a witness in a cause have in his possession any deeds or writings which it is deemed necessary to produce at the trial, a *subpoena duces tecum* may be issued, commanding the witness to bring them with him; or if deeds or other writings are in possession of the opposite party, his attorney or agent, notice may be given to such opposite party, his attorney or agent, to produce them; which, however, he will not be compelled to do in prejudice of his own rights. The writ of *subpoena duces tecum*, is the regular and established process of the court of common law; and though it was formerly doubted (1 Esp. Rep. 43. ibid. 405), yet it is now settled, that this process is of compulsory obligation on the witness, to compel him to exhibit the deeds or writings required of him, if he has them in his possession, unless he can produce a lawful or reasonable excuse for withholding them; of the validity of which excuse, the court and not the witness is to judge. *Amey v. Long*, 9 East, 473. And a person in possession of any paper, who is served with a *subpoena duces tecum*, is bound to produce it, whether the paper belong to him or not (6 Esp. Rep. 116; and see 1 Campb. 14. 1 Holt. N. P. 241, *in notis*), or though there be a regular way prescribed by law for obtaining it. The court, however, in all such cases, will exercise its discretion in deciding what papers shall be produced, and under what qualifications in regard to the interest of the witness. 1 Esp. Rep. 239.

Of *subpoena duces tecum*,

But in a court of equity, it is conceived, the most complete relief can be obtained. In an action of trover damages only can be recovered—the bare value perhaps of the stamp and parchment of a deed, without which the title to property of immense magnitude may be rendered unmarketable and insecure. In equity a bill lies for the delivery up of deeds unjustly detained; and the court will decree the defendant to deliver them up accordingly, if his defence be not substantiated; “for,” says Lord Hardwicke, “in an action of trover damages only can be obtained for the detention of the deed, but not the deeds themselves,” *Jackson v. Butler*, 2 Atk. 306; and it is the imperfection of the law in actions of trover and detinue, observes another noble Lord, that seems to be the ground of the jurisdiction in Chancery, for the specific delivery of the thing itself. Vide *Walwyn v. Lee*, 9 Ves. 35. On this principle it was said in a recent case, “that the delivery of title deeds is equitable relief, and the Court of Chancery having in that respect jurisdiction will do *complete justice*. The possession of the title deeds is incidental to the possession of the estate, but cannot be recovered with the estate at law. A court of equity therefore will give the title deeds to him who has at law recovered [qu. entitled to] the possession of the estate.” *Crow v. Tyrrell*, 3 Mad. Rep. 182. If an instrument ought not to be used, it is against conscience for a party to retain it, as he could only do so for some sinister purpose, Redesd. Tr. Pl. 104, n. (c), 3d edit.; and therefore he will be ordered to deliver it up. Ibid. So where, on a bill to have deeds delivered up, the defendant stated himself to be a trustee for mortgagees, but did not name them, he was decreed to deliver up the deeds and pay costs. *Scarborough v. Parker*, 1 Ves. jun. 267. But it seems necessary that all persons concerned in the title deeds should, in cases of this kind, be made parties to the suit. Ibid. And a court of equity, without any cause in court, has, from its general jurisdiction over a solicitor, ordered deeds in his hands, for the purpose of suffering a recovery, to be delivered up. *Usbridge ex parte*, 6 Ves. 425; and see *Strong v. Howe*, 1 Str. 621. 8 Mod. 359; and see on this subject *Smith ex parte*, 5 Ves. 706. For further on bills for discovery, and delivery of title deeds, see 1 Madd. Ch. 235. 2 ibid. 390, 2d edition.

Of bill in equity for delivery of title deeds.

notice of any trust, and *that the lease mentioned no such trust.* The plaintiff replied. The defendant proved his purchase, and the plaintiff proved no notice upon him. But, at the hearing, it was insisted, that he ought to produce the lease to shew there was no mention of the trust; besides, the answer being replied to, it was said, he was bound to prove it, which he could not do, without shewing the deed; for he took upon himself to judge what deed would amount to notice, and what would not, which he ought not to do. For, implied notice being as strong as express notice, if the lease mentioned *only the date and parties of another deed, which mentioned a trust*, it was deemed an implied notice, which the defendant might not know; and, therefore, the court ought to see it, that they might judge of it.

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Implied as
strong as ex-
press notice.
Arg^o.

But defendant
not obliged to
produce deed
which would
weaken his
title.

But it was argued, (s) on the part of the defendant, that being a purchaser, by the rule of the court he was not obliged to produce this lease, or shew his title; that this was an attempt to alter that rule, by a side-wind, and that it was as easy to say in a bill, it was in some of the deeds, as in any one in particular, and then he must expose them all, which would be of dangerous consequence to purchasers. It was replied, that if the deed were not produced, then, if one had a mortgage with a proviso of redemption, yet if the mortgagee was hardy enough to swear it an absolute purchase, and the mortgagor had no counterpart, he must lose his estate.

Unless plaintiff
make some
proof tending
to falsify an-
swer.

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The Master of the Rolls thought, that as this case was, the deed ought to be produced; but the Lord Keeper held otherwise, saying, it was a side-wind to make a purchaser expose his title (t), which his Lordship would not do, *unless the plaintiff had made some proof*, tending to falsify the answer, to induce him to it (v).

(s) *Hall v. Atkinson*, 1 Eq. Ca. Abr.
333, pl. 4.

(t) *Hall v. Atkinson*, 1 Eq. Ca. Abr.
333, pl. 4.

Reference to
master.

(U) It would, perhaps, in the present day, be referred to a Master to inspect the deed, and report to the court whether the mortgage, which the plaintiff alleges contains a trust for his benefit, really does contain such a trust, in the same manner as when a disinherited heir claims under a dormant entail, in which case the deeds are directed to be brought before the Master, to see whether he can discover any thing for the heir's advantage. *Suffolk v. Howard*, 2 P. Wms. 177. *Tanner v. Wise*, Forr. 287. S. C. 3 P. Wms. 296. *Reeves v. Reeves*, 9 Mod. 128. 132. Mr. Foublanque subjoins a query to this case of *Hall v. Atkinson*, 2 Foub. Trea. Eq. 491, n. (k), 5th edit. considering it difficult to support the decision with reference to the case stated,

And where, upon a decree for a foreclosure *nisi* (u), the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money, it was insisted, that such an order was never made. And so it was held; and the Lord Chancellor accordingly made an order that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title-deeds.

Mortgagee not compellable to produce title deeds.

But where the mortgagee consents to a sale, he thereby submits to do every thing which is necessary to a sale; in such case, therefore, he will be compelled to produce the title-deeds, the inspection of them being necessary before a sale can be made (x).

Unless he consents to a sale (v).

But a refusal to produce the title-deeds (y), in case of a decree of foreclosure *nisi*, seems to furnish good reason to enlarge the time to redeem, if the defendant applies to the court on that head.

But refusal good reason for enlarging time to redeem.

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If A. purchases an estate (z), with notice of an incumbrance, or that it is redeemable, and then sells to B., who has no notice, who afterwards sells to C, who has notice; by this the notice to A., the first purchaser, will not be revived; for, if it were, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in every respect, or the principle does not apply (w).

A. sells to B. with notice, B. sells to C. without notice, and he sells to D. who has notice, notice not revived.

(u) Anon. Mos. 246.

(x) Ibid.

(y) Ibid.

(z) *Harrison v. Forth*, Pre. Ch. 51.
Et vide etiam *Lougher v. Carlton*, Ca.

temp. Talb. 187. S. C. 2 Atk. 139.
[Barn. C. C. 358.] Et vide *Brandlyn v. Ord*, 1 Atk. 571. *Sweet v. Southcote*, 2 Bro. C. C. 66.

(V) Or it be necessary for the defence of the mortgagor's title. And so, on the other hand, a mortgagee has no right to shew the title deeds to a stranger, antea, 213, of this edition, note (S).

(W) But if A., having notice that lands were contracted to be sold to B., purchases those lands, and takes a conveyance to his son and heirs, though the son may have no notice of B.'s contract, yet the notice to his father will affect him. *Merry v. Abney*, 1 Ch. Ca. 38; et vide antea, 572. So if one, who purchases for another, have notice of a dormant incumbrance, it will affect the very purchaser. Ibid. And a fine and non-claim will not bar a person claiming under a trust, if the person to whom it is levied have notice of the trust. *Kennedy v. Duly*, 1 Sch. & Lef. 379. In like manner if a trustee convey to a person with notice, and takes a re-conveyance, it will operate nothing. Ibid. So if the person to whom he conveys hath no notice, yet on the re-conveyance the trust will attach, though it did not attach on the person to whom he conveyed; nor would it have attached if that person had conveyed to another without notice. Ibid. And if one taking from a trustee with notice levies a fine to strengthen his title, this will not bar the *cestui que trust*. Ibid. et vide antea, 487, of this edit. in notis. The same principle was again acknowledged in *M'Queen v. Farquhar*, 11 Ves. 478, where it was distinctly laid down that a person affected with

How one person affected with notice to another.

A. without notice, sells to B. with notice, B. not deprived of A.'s defence.

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Upon this ground (a), where A., who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of B., who was the *mesne* purchaser, and likewise against C., who was the *puisne* purchaser; A. had not replied to the answer of the representatives of B., and the question was, whether they should not have been brought before the court as proper parties? *Et per* Lord Hardwicke, Chancellor, the representatives of B., deny that he (B.) had any notice of A.'s title at the time he purchased, and it is admitted on all hands that C., who purchased of B., had notice of the title; now, if I should go on with this cause, I should deprive C. of the benefit he would have from the defence which is set up by the representatives of B. It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of B. before the court.

Notice immaterial to person claiming through those who have no notice.

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Again, where a bill was brought to discover whether the defendant (b), who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments from persons who had no notice. It was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice. But the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice;

(a) *Lowther v. Carlton*, Ca. temp. Talb. 187. S. C. 2 Atk. 139. [241. Ed.]
(b) *Sweet v. Southcote*, 2 Bro. C. G. 66. [S. C. 2 Dick. 671.—Ed.]
Barn. C. C. 358. Forr. 187.—Ed.]

notice will have the benefit of the want of notice to the intermediate parties; and therefore a purchaser with notice, from a purchaser who bought without notice, may shelter himself under such purchaser without notice, provided it be the same interest in every respect. *Et vide* S. L. Redesd. Tr. Pl. 224, 3d edition.

Lessee cannot over-reach lessor by assigning to one without notice.

In an old case a lessee for a long term entered into a new agreement for a lease, and thereby took a new lease of the same lands from the lessor for a less term than he had before, but did not cancel the old lease, and afterwards the lessee assigned the old lease to one who had no notice of the subsequent transaction, it was made a question whether such old lease should be good against the lessor. *Caher v. Neagle*, Harc. MSS. 8 Bro. P. C. 412, Toml. edit. It would surely be a novel case if the lessee, by any contrivance of this sort, could bind his lessor to an agreement, the subject of which was indubitably merged, if the writing itself were not cancelled.

for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

The general principle held out in the preceding cases that a mortgagee may, in a court of equity, protect himself from the discovery of title-deeds, *if he denies notice*, has been considerably shaken in a modern adjudication (c). (x) The bill stated the following case: A., upon the marriage of his daughter B. with C. the plaintiff, settled certain freehold estates to the use of himself for life, remainder to the use of B. for life, remainder to the children of the marriage as tenants in common in tail, and for default of such issue as to part to his son D., as to the rest to his daughter B. and her husband in fee. A. continued in possession till his death, then B. took possession and continued it from that time and became entitled to the possession of the title-deeds, but they had been by A. or D. delivered to the defendant, and she had them in her custody. The defendant set up a mortgage by lease and release from A. for 1000*l.* the bill charged that neither of the plaintiffs were privy to the mortgage, or that they did not know of it, or that the deeds had not been delivered to the defendant till a considerable time after the death of A., and prayed that the defendant might be compelled to deliver up all the title-deeds and evidences in their hands or power relating to the premises. The defendant, as to so much of the bill as sought a discovery of

Tenant in fee on his daughter's marriage, settles estate to himself for life, remainder to his daughter for life, remainder over. He then makes mortgage in fee to A. who has no notice of settlement, and delivers to him deeds. Bill by daughter in possession against A. for discovery and redelivery of deeds. Plea, mortgage without notice, ordered to stand for answer, with liberty to except.

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(c) *Strode & Wife v. Alice Blackburne*, 3 Ves. 222. Feb. 12th, 1796.

(X) The learned author here enters into a disquisition, which occupies this and the twenty-eight succeeding pages. It concerns certain passages attributed to Lord Rosslyn, in delivering his judgment in the case of *Strode v. Blackburne*. The adjudication was however not final, as his Lordship ordered the cause to stand over with liberty to except, implying, that his observations and statements were not to be taken as settled law, until upon further consideration they were confirmed. The objectionable passage is this, "the plea of purchase for valuable consideration without notice is a shield to the possession; and it is very difficult to imagine a case, in which it can be used for any other purpose than to defend the actual possession; for, *ex hypothesi*, the defendant is in possession of that which he seeks by the plea to defend," see p. 650, *postea*; consequently, to a defendant, who is out of possession, the plea of being a purchaser for a valuable consideration, without notice, will not be of any avail. This is certainly confining the plea to a very limited number of cases, and is little accordant with the extensive principle of favour and protection, which courts of equity uniformly profess to shew to a *bonâ fide* purchaser without notice. To this passage the learned author objects; and submits, with much force of argument, that in the previous decisions possession had nothing to do with the plea, see *postea*, 670. He concludes, by considering the observations of Lord Rosslyn (so far as they attempt to confine the doctrine of notice in this particular, to cases where the defendant is in possession only) as bad law; and this conclusion has been confirmed by the subsequent case, mentioned in the note to p. 677, *postea*.

Point discussed in next twenty-eight pages, stated and explained.

*Argument
against Strode
v. Blackburne.*

the title-deeds, pleaded the mortgage, and the plea contained averments that the defendant had no notice of the settlement, that the money was still due, and the other usual averments, and was supported by an answer denying notice. On the behalf of the defendant it was contended, that against a purchaser for a valuable consideration without notice, the court had no jurisdiction. But the Lord Chancellor (Loughborough) over-ruled the plea as to the discovery, and ordered it to stand for an answer with liberty to except.

*Effect of last
case on previous
decisions.*

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As the judgment in this case, *if it be law*, annihilates in a great degree that which had been previously considered by judges of the most distinguished eminence *as an infallible rule in a court of equity*, I cannot suppose that had this case been again agitated on an exception to the answer, the noble Lord who made the order would have dismissed all attention to the antecedent decisions on the point (d); and I trust its importance to purchasers, *under which denomination mortgagees are classed*, will exempt me from being thought digressive from the subject of this treatise, in offering such observations as appear to me to arise thereon. If I understand the scope of the arguments of the noble judge who decided this case, I take it to be as follows :

*Only use of plea
of purchase
without notice,
is to defend
actual pos-
session (Y).*

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His Lordship first stated the importance of the question in its effect on settlements, by enabling a tenant for life, with whom, in the ordinary course of business, the title-deeds rest, by a bad mortgage to defeat all the objects of the settlement. His Lordship then suggested " that *an idea had occurred* to him, and that, upon full consideration, it remained in his mind, that the plea of purchase for a valuable consideration was a *shield* to the *possession*, and that he found it very difficult to *imagine a case* in which it *could* be used for *any other purpose* than to defend the *actual possession*; and his Lordship observed, that it was very truly said by the Attorney-General, that in the plea it was *not* said *it was to maintain the possession*, that no such statement could be found in any plea; for *ex hypothesi*, the defendant *was* in possession of that which he sought by the plea to defend."

*Deeds follow,
and are incident
to estate in
hands of owner.*

His Lordship said, " the deeds were *incident* to the possession. They were not considered in law as chattels, but *fol-*

(d) Supra, 252. [infra, 665, et seq.—Ed.]

(Y) It is a shield to defend the possession of the purchaser, *Patterson v. Slaughter*, Amb. 292; not a sword to attack the possession of others, *see* 3 Ves. 225.

owed and were incident to the estate in the hands of the owner (a a). At law they belonged of right to the owner, and did not go to the executor." It was against all conscience to refuse to describe that, which the other party, by the admission of the defendant, had a right to recover. His Lordship admitted, "that if a court of equity was to make a mortgagee discover how he made out his title to that land of which he was in possession, there would be no conscience, no equity, no good discretion, even to enable the court to call upon the defendant, having paid money for the land without any notice, a title perfectly founded on conscience, if it had any foundation, to set forth his title."

Argument continued.

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His Lordship said, "there were cases, where the court would have no hesitation to make him, the mortgagee, describe the thing, of which he was in possession. If a mortgage was made by the owner of an estate, partly settled, partly unsettled, and during the possession of that owner the boundaries had been confounded, if a person under the settlement filed a bill to compel the mortgagee to set out, not the title, by which he claimed, but the metes and bounds of the estate, subject to his mortgage, no such idea could go to the extent, the defendant supposed." (a b)

Mortgagee not compellable to set out estate by metes and bounds, if not in possession.

His Lordship observed it came to this: the assumption must be, that she had a right to the deeds as a substantive property; that was as chattels. And his Lordship asked, "where was the distinction between this and the common case of goods, for which trover or detinue lay? A person averring that he was in such circumstances, that he could not describe them, required an account to be given to enable him so to do. Suppose a box of jewels was pledged by a person, not the owner, but a mere bailee, the pawnee supposing the person in possession actually the true owner, and there being no reason to think otherwise: there would be no difficulty in a court of equity in obliging him to explain and set out that property, of which he admitted the title to be in another, only claiming the value, for which it was pledged; a description, that would make it the subject of an action at law." (a c)

Bill of discovery maintainable for goods whereof trover lies, on averment that owner cannot describe them.

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His Lordship said, "it was remarkable, and he did not blame the pleadings for it, that though, where the defendant was in possession of the lands, he must state, that he made the

Plea must state that purchase was made from a person in actual seisin and possession.

(a a) [Et vide S. L. antes, 204, of this edition.—Ed.]

(a b) [See as to this, postea, 671.—Ed.]

(a c) [As to this, see *Hoare v. Parker*, 1 Cox, 224. S. C. 1 Bro. C. C. 578, and postea, 673.—Ed.]

Argument continued.

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Equity will prevent improper use being made of term.

purchase from a person in actual seisin and possession under a title of ownership, and it was so stated in this plea, as to the land, it was not so stated as to the title-deeds; for the language was, that he had the *disposal* of them: *so would a carrier: so a mere bailee*. That it was not a statement, that he was the owner; nor could it be so stated with truth and good conscience; for a tenant for life could not be said to have the ownership of the deeds. It was a *relative ownership*, as *incident to the title of the lands*. The *title and ownership* were in the plaintiff. The right was claimed, not as to a personal chattel, but as a *right incident to this mortgage*; and she was attempting to put the plaintiff under a disadvantage *by retaining that*, with regard to which *she could have no profit*."

His Lordship said, "it was pressed in the argument, and ought to be considered, *what these title-deeds might be*. If there were none of which the defendant could make *any advantage*, she was *without any beneficial interest or profit* to herself, retaining what *might* be a profit and advantage to the plaintiff. But there might be among them a term, which either might be attendant upon the inheritance, as a satisfied term, or a term amounting to a freehold, of which she might make advantage. If a satisfied term, *it would be absurd to let it remain* in the hands of the defendant; for the only effect would be to leave to the defendant what could be of *no advantage to her*, but only a vexation to the plaintiff; for if *she attempted to avail herself* of it *improperly*, though that might not appear to a court of law, it would appear to that court, and *that court would interfere* to prevent that improper use of it. On the other hand, if it amounted to an estate of *freehold*, which [654] would enable her to get possession, he did not know, that *that court could compel her to deliver up that*. Till the discovery was made, it was impossible to know whether any relief could be given."

Situation of parties viewed.

In order to form an opinion upon the propriety of the order made in this case, it is necessary to advert for a moment to the situation of the parties before the court, and then to inquire upon *what principles* courts of equity have *hitherto* acted in *such cases*. The parties contending were on the one side a mortgagee, who must be assumed (until the contrary be proved) to have used all necessary inquiries to ascertain the validity of the title of the person with whom he was contracting to give the security offered, and to have taken the *only precautions* that *can be pursued* in dealing with real property; that is, who had

dealt with a person in possession, had secured to himself the possession of the title-deeds, and had paid a *full consideration* for the property to which they related. On the other side, a person claiming also for a *valuable consideration* under the same party, by virtue of a previous settlement. One of these parties must suffer a loss. No reason existed as between two innocent persons, in a *moral view*, why that loss should be shifted from the one and thrown upon the other (e), unless the laws of property so ordered it. "An hardship ought not to be decreed against one, in order to prevent its falling upon another." Now, it was clear, that *at law* the person claiming under the settlement must, if the settlement was not produced, eventually have been the sufferer, for the mortgagee was in possession of such a title as would have enabled him to recover the possession against the person entitled under the settlement, if *that could not be produced*. The production of the mortgage-deed *would have entitled him to recover in ejectment*. Therefore no defence could have been made without the interference of a court of equity to compel a discovery and production of the settlement. The settlement, therefore, in this case was, as described in a beautiful allusion by that great judge Sir Matthew Hale, *tabula in naufragio*. There was no salvation for either party, but in the possession of this plank; with the possession of it, the title of either party was irresistible.

Argument continued.

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Under these circumstances what jurisdiction had a court of equity? Such court, it is apprehended, is dormant, unless an existing equity, preponderating on one side, calls it into action. Where was that equity in this case? The party desiring to retain, and the party wishing to acquire the settlement in question (for that was the only material deed) stood precisely in equal equity (z), each was justified in law and morality in struggling for the subject which both had purchased; consequently there was no motive for such court to act. Such court, it appears to me, must lose sight of the elements of its constitution, if it acted on such an occasion. The question then of ownership of the deeds was entirely out of the case; but if the ownership had been material, the legal owner of the deed was

Their rights considered.

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(c) Per Lord Macclesfield, 1 P. Wms. 74, 7, et vide *supra*, 211, [160 of this edition,—his Lordship's words are, "If one must suffer, it must be he who has not used due diligence in

looking into the title, but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure*."—Ed.]

(Z) In which case the rule, *Qui prior*, &c. is applicable.

Trustees of settlement ought to retain title deeds (A).

not before the court, for it is apprehended the trustees of a settlement to uses are the legal owners of the deeds; with them they ought to rest, and if in the ordinary course of business it is otherwise, "it is a usage better in the let than in the observance," as it leads to great fraud.

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These are the principles on which it is apprehended courts of equity have acted in cases of this nature, from their first institution to the present time.

Equity will not disarm bona fide purchaser without notice, but will assist him.

The law upon this subject is clearly laid down by Lord Nottingham, in the case of *Sir William Basset et al. v. Nosworthy (f)*. The plaintiff W. B. entitled himself as son and heir of E. S., who was the only daughter and heir of J. K., who was brother and heir of H. K., whose estate the lands were formerly. The defendant E. N. was a purchaser of these lands from persons claiming under the will of the said H. K. of which will the plaintiff W. B. alleged there was a revocation by some subsequent deed or will, and for a discovery thereof, and what E. N. really paid for the purchase, and what deeds and writings he had, &c. the bill was exhibited. The defendant pleaded another bill brought in the Exchequer for the same matter, and after a full hearing dismissed, and the dismissal signed and enrolled; and further, that he was a purchaser for a valuable consideration *bona fide* paid without notice of any revocation. The case was first brought on before Lord Bridgman, who had got wrong in the proceedings. It was then heard before Lord Nottingham, who, having set the cause right

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(f) 25 Car. 2. 1673. Finch's Rep. 102. [antea, 478, of this edit. is notis.—Ed.]

Of persons entitled to custody of deeds.

(A) This would prevent many opportunities of committing fraud. But the owner of an estate, who, on his marriage, has settled the property on himself for life, with remainders over for the benefit of his issue, is not always willing to deliver up deeds, which he considers himself entitled to as the head of his family: and trustees themselves are sometimes averse to risk all accidents which might befall the deeds while in their possession. *Prima facie* a person in possession of an estate, under a title that gives a freehold interest at the least, has a right to the custody of the title deeds, *Ford v. Peering*, 1 Ves. jun. 72, *Webb v. Lymington*, 1 Eden, 8, *Bowles v. Stewart*, 1 Sch. & Lef. 209; yet, says Lord Hardwicke, it is the ordinary relief of the remainder-man to have the title deeds taken care of against the tenant for life: but this equity does not extend to a remote remainder-man, *Joy v. Joy*, 2 Eq. Ca. Abr. 284, pl. 4, *Ivies v. Ivies*, 1 Atk. 431, *Smith v. Cooke*, 3 ibid. 382, *Lempster v. Pomfret*, Amb. 154, *Southby v. Stonehouse*, 2 Ves. 612, though it comprehends the case of a jointress, provided the party confirm her jointure. *Senhouse v. Earl*, 2 Ves. 450. *Leach v. Trollope*, ibid. 662. *Petre v. Petre*, 3 Atk. 511. But an heir cannot support a bill for title deeds, without shewing that they are in some way necessary to enable him to recover at law. His title as heir is what he must rely on; and if he cannot set aside the will, he has nothing to do with the deeds. *Jones v. Jones*, 3 Meriv. 172; et vide *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 66; and *Banbury v. Biscoe*, 2 Ch. Ca. 42.

before the court, said, that upon the true merits thereof, there were only two points which were considerable. 1st. What the law of this court was concerning purchasers. 2dly. Whether the defendant was a purchaser within that law. As to the first point: "A purchaser, *bonâ fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a *statute* or *mortgage*, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for *equity will not disarm a purchaser but assist him*; and precedents of this nature are very ancient and numerous (*viz.*) where the court hath refused to give any assistance against a purchaser either to an *heir*, to a *widow*, or to the *fatherless*, or to *creditors*, or even to one purchaser against another." And his Lordship further observes, "that this rule in a court of equity is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and inventions of the law, to protect the possession, and to strengthen the rights of purchasers."

Argument continued.

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On the same ground Lord Keeper North, in the case of *Perratt v. Ballard* (g), refused to compel a purchaser of jewels, &c. from one against whom a commission of bankruptcy afterwards issued, to answer as to the time of the bankruptcy, saying, "it was an infallible rule, that a purchaser, for a valuable consideration without notice, shall never discover ANY THING to hurt himself;" and see *Brown v. Williams*, 2 Ch. Ca. 135. et *Wagstaff v. Read*, *ibid.* S. L. 156. Upon the same ground Sir Nathaniel Wright, Lord Keeper, in the case of *Hall v. Atkinson* (h), refused to oblige a purchaser to produce a lease, which it was said mentioned a trust; his Lordship said it was a *side wind*, to make a purchaser produce and expose his title, and he would not do it, unless the plaintiff had made some proof towards falsifying his answer. And Lord Talbot, speaking of the rules of equity, in the case of *Collet v. Ward* (i), lays down this rule in these broad and unequivocal terms. "One of these rules is, that a purchaser for a valuable consideration without notice, having as good title to equity as any other person, this court will never take any advantage from him, and consequently will not grant a discovery against him, of the only equity he has to defend himself by, which if he should be obliged to discover,

Purchaser without notice never compellable to discover any thing to his prejudice

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(g) *Perratt v. Ballard*, 33 Car. 2. S. C. supra, 642, [653, of this edition.—Ed.]

2 Ch. Ca. 72.

(h) 1 Eq. Ca. Abr. 333, 4. Et vide (i) Ca. temp. Talb. 68.

Argument con-
tinued.

Same of mort-
gagee if he de-
nies notice.

[661]

Ownership of
deed concealed,
nothing to do
with right to
call for its dis-
covery.

[662]

the other party would immediately *take advantage of*. And there certainly may be cases, where a purchaser, for a valuable consideration, shall *not* be obliged to discover *any thing*, (whether incumbrances that he has got in *or any other thing*), but *all advantages* shall be left to him to *defend himself*. Suppose two purchasers, without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, *who still is as much a purchaser for a valuable consideration as himself*." Lord Hardwicke emphatically says, in the case of *Senhouse v. Earl (k)*, "it is a *constant, invariable rule*, "that *ANY mortgagee* may protect himself from the discovery "of his title-deeds, *if he denies notice*." "As to a jointress," he says, "it is otherwise, where the plaintiff claims as heir at law "to the person who made the jointure, and no appearance of "any settlement, the court will, upon the defendant's offer to "confirm the jointure, oblige a production of the deed; but, "as to a mortgagee, if the plaintiff brings his bill to redeem, "ever so strongly, he is not entitled to see the mortgagee's title-deeds. Why? because a third person may find out a flaw "in them. IT IS A FIRST PRINCIPLE AND NOT TO "BE ARGUED, it depends THEREFORE, on the denial of "notice."

In this opinion of Lord Hardwicke, we see the extent of the criticism suggested by Lord Loughborough, in the case under consideration, as to the distinction between cases in which a person shall be permitted to retain property in which he has no beneficial interest, but which may be of advantage to another, and where he shall not. If, in such case, the claim of the holder of the deed be admitted and allowed, the deed shall be produced for the benefit of the party, who has a right to take every advantage of it, *except as against the claim of the party holding it*. But, *unless the claim of the person holding it be allowed*, if that claim be consistent with conscience, that is, *if it be purchased for a valuable consideration without notice*, he shall not be obliged to produce that which may discover a flaw in his title, *though another be the owner of it*. Then, it is apprehended, the actual ownership of the deed concealed has nothing to do with *the right to call for its production* against a person claiming as a purchaser without notice. Such a person has a right to use the advantage he has got either *defensively, or offensively, actively, or privatively*.

And it seems that a court of equity acts so strenuously in this case, in behalf of such a purchaser, that to rebut this plea actual notice must be made out in proof. The court will not presume any thing against such a purchaser (l). Therefore, where tenant for life, sold as tenant in fee, and the settlement was produced and delivered to the purchaser himself, yet the court would not affect the purchaser with presumptive notice, but dismissed the bill.

No presumption against bond fide purchaser.

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But an idea is started in the judgment now under our consideration, that this plank can only be made use of as a shield to the actual possession. And the Chancellor says, it is difficult to imagine a case in which it can be used for any other purpose than to defend the actual possession. The Attorney-General in arguing this case, suggested in answer to this observation, that in the plea it was not said, it was to maintain the possession. The answer given by the noble Judge, was, "that if his Lordship was right, no such statement should be found in any plea; for *ex hypothesi* the defendant was in possession of that which he sought to defend." But this seems to be *petitio principii*. A mere circle. But Lord Nottingham considering the law on this subject, in the case of *Basset v. Nosworthy*, states two purposes for which this rule was established, in analogy to the common law in its maxims, which refer to descents, discontinuances, non-claims, and collateral warranties, viz. to protect the possession, AND TO STRENGTHEN THE RIGHTS OF PURCHASERS (m).

That plea without notice can only defend actual possession, questioned.

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No case that I have been able to discover has set any such limits as those suggested by the Chancellor, in this case of *Strode v. Blackburne*, to this plea, founded upon this rule or first principle, as it is called by Lord Hardwicke (n). On the contrary, Lord Hardwicke says, any mortgagee may protect himself from the discovery of his title-deeds, if he denies notice. Indeed, if any distinction were made in the application of this rule, between a mortgagee in possession, and a mortgagee out of possession, a singular inequity would be the consequence, and that without any reason for it. For then a mortgagee in pos-

For any mortgagee may protect himself from discovery of deeds, if he denies notice.

(l) *Philips v. Redhill*, 2 Vern. 160. [But the principal point in this case is considered as over-ruled, by *Daniels v. Davison*, 16 Ves. 249, and cases therein cited.—Ed.] Et vide *Jerrard v. Saunders*, infra, 667, in which the term being derivative, involved presumptive notice of the settlement by which it was created.

(m) Vide supra, 659.

(n) *Sir J. Burlace v. Cook*, 2 Freem. 24. [cited and acknowledged 2 Ves. jun. 457.—Ed.] *Millard's case*, ibid. 43. *Seymour v. Nosworthy*, ibid. 128. *More v. Mayhow*, ibid. 175. *S. C.* 1 Ch. Ca. 34. *Shorly v. Fag*, ibid. 68. *Meynell v. Garraway*, Nels. Ch. Rep. 63. *Heyman v. Gonedon*, Finch, 34. *Cantrell v. Mannington*, ibid. 219.

Argument con-
tinued.

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session would be protected in his defective title, but a mortgagee out of possession would be defeated; and yet there is no equity in favour of the one, more than in favour of the other; for a mortgagee does not, in the ordinary course of things, take possession; the nature of the contract does not require it; it is contrary to the intention of the parties (o). A mortgagee only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say, he would have nothing to do with the management of the estate: it is generally stipulated that the mortgagor shall retain possession till the mortgage is forfeited. The omitting to take possession, therefore, does not expose a mortgagee to the imputation either of fraud or negligence. But a new system must be adopted by mortgagees, if this plea be thus qualified, or they must renounce the benefit of this rule, which equity has established *to strengthen the rights of purchasers*.

Previous deci-
sions against
Lord Rosslyn's
proposition.

[666]

But it does not rest merely upon the absence of any such allegation in the plea, there are several authorities and cases which in fact decide the point the other way. In the case of *Brampton v. Baker*, in 1671, stated in a former part of this treatise (p), we find the very case in terms. A mortgage by a tenant for life, to one, who *actually* had *seen* the deed of settlement, but had been advised that the tenant for life could destroy the contingent remainders, whereas in truth the remainders had vested, by the birth of a son a day or two before; but of which the mortgagee had no notice. But the mortgagee having got the deed of settlement, the court would not relieve against a purchaser, but dismissed the bill. And in the case of *Seybourne v. Clifton* (q), where the plaintiff and defendant had each of them purchased a *reversion* expectant on the death of tenant for life, (consequently neither of them were in possession,) the plaintiff's bill that he might examine his witnesses to preserve their testimony, and might be permitted to try his title in the life-time of the tenant for life, was dismissed; for as the purchaser was a defendant, the court would do nothing in it, and the plaintiff lost his land for want of examining his witnesses (B): *et vide Beckwenall v.*

(o) Vide supra, §10, [155, of this edition.—Ed.]

(p) Supra, 588.

(q) Cited by Lord Rawlinson, 2 Vern. 159.

(B) The bill was unquestionably dismissed, though Nels. Ch. Rep. 125, seems contra. The case was noticed by Lord Eldon, in *Dursley v. Fitz-*

Arnold, 1 Vern. 354. S. L. And Lord Hardwicke, in the case of *Willoughby v. Willoughby* (r), observes, speaking of severing a term to attend the inheritance from the inheritance, "if such a purchaser (that is, a purchaser for a valuable consideration, *bonâ fide*, not affected with any fraud or collusion,) has no notice of a prior incumbrance, and takes a defective conveyance of an estate, and an assignment of a term to attend the inheritance, in this case he shall have the benefit of the term to protect his estate. And he may either *defend his possession by it*, or he may *use it to recover his possession at law*, though his adversary has the inheritance, which makes me (Lord Hardwicke) say, that this court often disannexes the term from the inheritance. This is the meaning when it is said, 'that if a man have law and equity on his side, he shall not be hurt here'."

Argument continued.

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The last case I shall cite upon this point, is that of *Jerard v. Saunders* (s). The facts in this case were, that in 1711, J. H. seized in fee, demised to G. for a term of 1000 years, which about the year 1730 being by *mesne* assignments vested in H., subject to a mortgage to B., was purchased by C. J., and by indentures between the mortgagee H., C. J. and his trustees some time in the year 1730, (the more particular date whereof the plaintiff had not been able to discover, as such deed was in the custody of the defendant,) the premises were assigned for the remainder of the term in trust for C. J. *for life*, remainder to T. J. and S. his wife, for the lives of them and the survivor, remainder for all and every the children of their bodies, &c. with divers remainders over. C. J. held till his death in 1749, then T. J. entered and held till his death about fifteen years before. His wife died in his life, and the plaintiff as their only surviving child entered. The defendant, under colour of some mortgage from T. J., had got in his possession the settlement of 1730, and other title deeds, and had filed a bill of foreclosure and brought two ejectments. The bill charged notice of the settlement and its contents on the defendant, and other special circumstances, and prayed that the defendant might answer, and produce the settlement and all other title deeds, &c. and an injunction from proceeding at law. The defendant pleaded a mortgage without notice actual or constructive; which

Defendant, stating by answer, purchase for value without notice, not compellable to answer further.

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(r) *Supra*, 493.

(s) 2 Ves. jun. 454.

hardinge, 6 Ves. 263, who read a manuscript note of it, supplied him by Mr. Hollist, from which Lord Eldon said, it appeared that the case amounted to no decision at all.

Argument continued.

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plea had been over-ruled on a former hearing, because the facts from which notice was inferred, were not denied. An answer was then put in, to which a great number of exceptions were taken. The point came before the court, on exceptions to the Master's report upon the exceptions to the answer. Lord Loughborough, Chancellor, after stating that Lord Nottingham had laid it down, "that *against a purchaser for a valuable consideration*, the Court of Chancery had *no jurisdiction*; and that *Fag's* case was determined by him: That the defendant in that case had picked up from the conveyancer's table the deed that affected his title; and though he got it in that manner, Lord Nottingham would not oblige him to set it forth. Lord Loughborough said, a case that occurred to his recollection produced many points, it was *Basset v. Nosworthy* (t). His Lordship said, the book did not state it amiss, and he cited the passage before-mentioned. His Lordship said, he was *perfectly satisfied* upon the *general* reasoning, that court would *never* extend its jurisdiction to *compel* a purchaser, who had fully and in the most precise terms, denied all the circumstances mentioned, as circumstances from which notice might be inferred, *to go on to make a further answer* as to all the circumstances of the case, that were *to blot and rip up* his title. To do so would be to act *against the known established principles of that court*. His Lordship thought it had been decided, that against a purchaser for valuable consideration without notice, that court *would not take the least step imaginable*. His Lordship said, he believed it was decided, that you *cannot even have* a bill to *perpetuate testimony* against him. He was pretty sure, it was determined, that *no advantage* should be taken from him *by that court*. The doctrine as to the jurisdiction of that court was *this*: you cannot *attach* upon the conscience of the party *any demand whatever*, where he stands *as a purchaser having paid his money*, and denies all notice of the circumstances set up by the bill. And his Lordship allowed the exceptions to the report.

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Not least step taken against purchaser for value without notice in equity, not even to perpetuate testimony against him.

Possession irrelevant to plea of purchase without notice.

The manner also in which this defence is used, shews that possession has nothing to do with it. For the defendant denies notice, which denial of notice must be by way of answer, which answer must meet the allegations of the bill, and the plea is founded on the answer, and alleges seisin and possession, (*not in the purchaser*), but in the person from whom the purchase is made. Therefore if the bill alleges that the defendant had

(t) Vide supra, 637.

notice *at or before* his taking the conveyance, the answer must deny the fact as stated; viz. that the defendant had notice before that time: vide *More v. Mayhew*, 1 Ch. Ca. 34. S. C. 2 Freem. 175. *Anon.* 2 Ch. Ca. 161, et *Trepanian v. Mosse*, 1 Vern. 246. Now it appears to me to follow of course, that if, *an instant* after the money paid and conveyance made, the defendant had notice (*i. e.* before he could possibly have actual possession, unless the deeds were executed on the lands, which is rarely the case) the purchaser might the next moment put in this plea to a bill by a prior purchaser to discover title deeds.

Argument continued.

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The Chancellor, in the principal case, puts two instances to illustrate the grounds upon which his decision is founded. The first, if I understand it, is the case of the mortgage of an estate partly settled and partly unsettled, the boundaries of which had been confounded during the possession of the owner. In such case, his Lordship observes, this plea could not be carried to the extent the defendant supposed. The observation that presents itself on this instance is, that if the mortgagee understood he was taking a mortgage of settled and unsettled estates, his Lordship's conclusion is strictly correct, this plea would not protect the mortgagee from setting out the boundaries. But if the mortgagee had not notice that part of the estate was in settlement, the instance put involves merely the present question on another case similar in its nature, and subject to be decided on the same principles.

When mortgagee compelled, liable to set out boundaries of estate mortgaged.

[672]

A case nearly similar occurs in the books, which, in the instance of a purchaser without notice, militates the other way: I allude to the case of *Snelling v. Squib* (v), where A. had a judgment against B. of 1200*l.* for payment of 500*l.* C. purchased of B. for a valuable consideration without notice. A. sued C. to discover lands subject, &c. that he might extend them, not knowing the place nor who were the tenants. C. pleaded his purchase for a valuable consideration without notice. The Lord Chancellor allowed the plea; for such purchaser should not be hurt in Chancery against the plea, and therefore C. should not be obliged to discover what lands were liable. And the reporter says, "It was much debated and objected that a judgment binds the land whoever had it." And the plaintiff's bill was not to have a decree for his debt, or to have the land, but to discover the same whereby at law he might recover his debt.

Purchaser not obliged to discover to creditor what lands are subject to his judgment.

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*One buying
 goods of bank-
 rupt between
 act and com-
 mission sued,
 not obliged to
 discover what
 goods he really
 bought, if at
 time he had no
 notice of bank-
 ruptcy.*

The second case put by Lord Loughborough is an instance of personal chattels pledged by a person, not the owner, but who had a qualified interest therein. This case is distinguishable from the principal case, in as much as value paid gives no title to such property, unless it be transferred in market overt; consequently, unless the transfer be made in market overt, the holder is no purchaser. But if the purchase was regularly made, the case of *Abery v. Williams (u)*, seems to warrant a contrary conclusion upon the facts stated, than that which is drawn from similar ones in the judgment in *Strode v. Blackburne*. In the case to which allusion is now made, the bill set forth, that A. being indebted to the plaintiffs and others, a commission of bankruptcy issued against him the 16th of November, 1780, and that several suits of tapestry of his were in the defendant's hands, which the commissioners had assigned to the plaintiffs for the benefit of his creditors, and that they ought to have an account thereof; but that the defendant pretended they were pawned or sold to him by the bankrupt without any trust; whereas it was on a trust, and done to conceal them, and so prayed a discovery and relief. The defendant pleaded that neither he nor any in trust for him had, nor ever had, any goods belonging to the bankrupt, but what the defendant bought *bonâ fide* for a full value in money really paid by the defendant to the bankrupt, or his order, before any commission was sued out against him, and before the defendant had any notice that he was a bankrupt, or had done any act of bankruptcy, and without any trust or condition, other than that the defendant by parol did declare, that if the bankrupt paid the money paid him by the defendant, and interest for the same, at the time agreed on, and then past, that then the defendant would re-deliver the goods to him; and averred that the bankrupt failed to pay the money, or any part of it, at the time agreed on. And that the bankrupt, two years since, agreed that the same should be sold by J. S., and that by the money so to be raised, the defendant should be paid his money with interest, and the surplus to the bankrupt; and averred that the money raised by sale was 200*l.* short of what the bankrupt owed him, and which 200*l.* was still due. And that the 19th of October, 1680, the defendant gave the bankrupt a general release to that time; and that the defendant had no dealings with him since. And the defendant

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(u) 1 Vern. 27. [and if two months have elapsed since the purchase, and no commission issued, the purchaser will be safe under Sir Samuel Ro-

milly's act, 46 Geo. 3. c. 135, considered more at large in a former note, see ante, 594, of this edition, note (R).—Ed.]

further pleaded, that he had been examined by the commissioners, as far as by law he was obliged ; and insisted, that being a purchaser so as aforesaid, he ought not to be put to answer, to subject himself to an action, which the bill aimed at, by pressing a discovery of what goods of the bankrupt came to the defendant's hands. The Lord Chancellor allowed the plea, and said the law was hard against tradesmen that dealt with bankrupts before notice ; and the assignees *ought not* to be assisted in equity in any such case.

Argument continued.

[675]

And in the case of *Wagstaff v. Read* (x), which arose on a bill for a discovery against one who had purchased goods of another, against whom a commission of bankruptcy had afterwards issued, and who was said to *have purchased them under their value*. The Lord Keeper inclined to make the defendant discover what goods he had had, and at what price. But the defendant's counsel objecting that this would destroy and prejudice the purchaser, though he paid the full value ; for if he discovered what he paid, the commissioners would assign the money, *and so the court should be instrumental to wound the purchaser*. If the plaintiff could help himself at law, by the aid of the statute of bankrupts, he might, and the court would not hinder him, *but not aid him there*. The Lord Keeper ordered, that the defendant should answer what and how much he paid, so as the plaintiff did consent to take no advantage of the discovery, but in that court and not at law, which the plaintiff consented to by his counsel, and was to subscribe his consent with the register, and then the defendant was to answer.

But on suggestion of purchase at under value, discovery ordered on terms.

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So (y), where a bill was to discover whether a lease made in Queen Elizabeth's time for ninety-nine years, in trust for Dr. L., to commence after the estates then in being were determined, was not effluxed in point of time, and charged, it would so appear by deeds and writings in the hands of the defendant, the assignee of the lease, and that he knew the lease was expired, but refused to discover. The defendant pleaded the lease, and that he was informed, that in *seventy-seven*, when he purchased, there were *fifty-seven* years to come in the lease, and therefore gave after nineteen years purchase for it, and *consequently* ought not to make any discovery to *impeach or weaken his title*. And the plea was allowed, and a demurrer also.

Plea of purchase for value, without notice. Discovery not granted.

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I have now gone through the argument, and, with great deference to its illustrious author; I cannot but submit it as my

Argument against Strode v. Blackburn concluded.

(x) 2 Ch. Ca. 156.

(y) *Bishop of Worcester v. Parker*, 2 Vern. 255.

opinion, that from the authorities extant upon the subject, it appears that the law is to be found in the judgment on the case of *Jerard v. Saunders*, and not in that of *Strode v. Blackburn* (c).

*Author's doubts
well founded.*

(C) The learned author's conclusion has since been fully confirmed by the present Lord Chancellor, in the case of *Walwyn v. Lee*, 9 Ves. 24, which was in circumstances precisely similar to that of *Strode v. Blackburn*. A tenant for life, alleging himself to be seised in fee, and being in actual possession of the premises and of the title deeds relating thereto, as apparent owner thereof, executed the several mortgages under which the defendant Lee claimed, and delivered to the mortgagees the title deeds appertaining to the premises, which were then in the possession of the defendant (who was an assignee of the mortgages). The tenant for life dying, his son, who was tenant in tail expectant on his father's decease, under his father's marriage settlement, took possession of the estate, and filed a bill for discovery and delivery of the title deeds. To which the defendant pleaded, that he was a purchaser for valuable consideration without notice of the settlement; and contended, that previously to the case of *Strode v. Blackburn*, the circumstance of possession was never considered as making any difference as to the right of the purchaser, and could not be the criterion; for where was the distinction between a purchaser in possession, and one, who by the deeds in his custody, had the means of obtaining possession? In general, a mortgagee did not take possession; nor was that the object according to the nature of his contract. It could not therefore be necessary to give him the protection of a purchaser. All the authorities, except *Strode v. Blackburn*, were in favour of the defendant; uniformly holding, that against a purchaser for valuable consideration without notice, there was no jurisdiction. [This proposition, however, has never been fully acknowledged.] There was no claim upon his conscience. Lord Rosslyn himself, in *Jerrard v. Saunders*, would not take the distinction upon the possession for the first time attempted in *Strode v. Blackburn*; and it was conceded, on the part of the plaintiffs, that certainly it was immaterial whether the purchaser were in or out of possession: but it must appear upon the record that he was entitled to the possession; whether he was in possession, or had deeds that would entitle him to the possession, was immaterial: but in all those cases the purchaser had a right to take the possession. If the defendant could state that there was an outstanding term, certainly he might protect himself; for by that he could get possession. But, as the case stood, he neither had the possession nor the means of procuring it. Would the court then permit him to keep the deeds for the single purpose of extortion?

*Supported by
Lord Eldon.*

The Lord Chancellor said he could not help entertaining doubt, whether the decision, which was brought in question upon this plea [namely, that of *Strode v. Blackburn*], stood upon right principles. It was impossible, if that case were right, that a mortgage could be taken without taking possession. It was assuming the question to suppose, that all those deeds could be of no value or consequence to the defendant [Blackburn]. There was the obvious instance, that there might be an old satisfied term; an assignment of which the defendant might procure, and maintain an ejectment. Certainly it was not like the case of a claim to hold the deeds as mere chattels. They were held as matter of title. As the case of the box of jewels was put,—Lord Eldon had difficulty in assenting to it; for it was assuming the question. It was very unlike the case of a carrier or bailee, who have no power of disposal; that is, to do what they please with the subject. The passage towards the end of the judgment [in the case of *Strode v. Blackburn*], as to a satisfied term, was inconsistent with the established doctrine,—that if a purchaser can get in a satisfied term, he may make use of it; and this court will not prevent him. It probably alluded to the doctrine of courts of law then got rid of, as to satisfied terms; which certainly went to shake all titles. [This, perhaps was in allusion to his Lordship's doubt in *Erans v. Bicknell*, 6 Ves. 184; but it is questionable whether that doubt is well founded, see *antea*, 498, of this edition, in *notis*.]

Where a mortgagee (z), after notice of a subsequent mortgage, joined with the mortgagor in sale of the lands to a

Mortgagee bound by notice of subsequent mortgage.

(z) *Bentham v. Haincourt*, Pre. Ch. 30.

The importance of this question, continued Lord Eldon, was very great; in the case before him the mortgagor was in possession of the estate; which was *prima facie* evidence, that he was owner of the fee-simple. He was in possession of documents, which would prove him to be tenant in fee. The mortgagee, who without doubt was a purchaser for valuable consideration, stood in circumstances, that enabled the defendant Lee to aver every proposition necessary to the plea, of a purchase for valuable consideration without notice, seeking to shut out the discovery: viz. that the vendor or mortgagor was the owner or pretended owner; and (which Lord Eldon conceived must be averred,) that the mortgagor was in possession. It was never held necessary to aver in the plea that the purchaser was put in possession. Lord Eldon knew of no such case. Lord Rosslyn upon that said, it should not be averred; for, *ex hypothesi*, the plea presumed it. Lord Eldon doubted that; for what was necessary to the plea of purchase for valuable consideration, as in the case of every other plea, must be averred; and it would go this length, that it was not necessary to aver, that the vendor was in possession; for if the plea would not do, unless he were in possession, the same doctrine would equally authorise the omission of the fact, that the purchaser took possession, if it was necessary that he should do so. With respect to this particular species of purchaser, a mortgagee, it was also to be remembered, that the possession did not in the nature of the thing ordinarily accompany the transaction; and the fact that the mortgagor remained in the possession, in one sense did not amount to an assertion, that the mortgagee was out of possession; and it was admitted, that during the life of the mortgagor, while the mortgagee had the legal as well as the equitable right, the mortgagee was to be considered in possession. And if in any case the mortgagee is to be taken as out of possession, that might be occasioned not by any species of negligence, in not taking actual possession originally according to his title, but by the defect arising out of the nature of the title he had the misfortune to take. It was of necessity then, that this court should hold as against a purchaser for valuable consideration without notice, that if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this court, and thrown in to the person, who has got from him the possession of the estate? And was it not worth consideration, whether the very principle of this plea were not this: "I have honestly and *bona fide* paid for the estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril, in which you state I have placed myself in the article of purchasing *bona fide*." Lord Eldon concluded by saying, that he felt the case to be of great importance, with reference to the transactions of the world, (especially if he should be compelled to infringe upon an authority, to which he looked with great respect, but which at that moment he could not think consistent with the doctrine of the court, as to a purchaser for valuable consideration without notice,) and therefore he thought he should be obliged to take further time to consider, which his Lordship took accordingly.

Plea should aver, that vendor or mortgagor was owner, or pretended owner, and that he was in possession, — not that purchaser was.

The plea having stood a considerable time for judgment, was allowed. Thus placing it beyond doubt, that in a plea of purchase for valuable consideration without notice, it is not necessary that the plea should aver that the purchaser was put in possession. But the plea should aver that the vendor was seized in fee or pretended to be so seized, and that he was in possession (if the conveyance purport to be an immediate transfer of the possession,) at the time when the vendor executed the purchase-deed. *Trevanion v. Mosse*, 1 Vern. 246. *Storey v. Windsor*, 2 Atk. 630. *Heal v. Egerton*, 3 P. Wms. 381. *Walwyn v. Lee*, 9 Ves. 52. *Attorney-General v. Backhouse*, 17 ibid. 291, and Redd. Tr. Pl. 215, 2d. edit. And this possession will be satisfied by the possession of the vendor's tenant. *Daniels v. Davison*, 16 Ves. 252; S. C. 17 ibid. 433. Where the purchase is of a reversionary estate, of which the possession cannot consequently be immediately had, the plea must set out how the person from whom the title

Plea of purchase for valuable consideration without notice, must aver possession in vendor, conveyance, and consideration, and deny notice and fraud.

stranger, it was resolved, that the money received by either, for the purchase, should sink so much of the mortgage money.

is deduced became entitled. *Hughes v. Garth*, 2 Eden, 168; *S. C. Amb.* 421. And the plea must aver an actual conveyance, and not mere articles or an agreement to convey, *Bradlyn v. Ord*, 1 Atk. 571, *Fitzgerald v. Fauconbridge*, Fitzgib. 207, *Hart v. Middlehurst*, 3 Atk. 371, *Head v. Egerton*, ubi supra, and *Beatniff v. Smith*, 1 Eq. Ca. Abr. 357, pl. 11; and as a mere volunteer is not clothed with the character of a purchaser and cannot protect himself by a plea of this kind, (see 2 Atk. 241,) it is also necessary that the plea should aver the consideration and actual payment of it. In one instance, a plea averring that the money was paid, or was *bonâ fide* secured to be paid, was over-ruled, *Hardingham v. Nicholls*, 3 Atk. 304; and in another, a plea averring that the purchase-money was paid and secured, but not setting forth the amount of the purchase-money nor to whom paid, was over-ruled, *Cantrell v. Mannington*, Finch, 219. So we have seen the plea of purchase for valuable consideration, must deny notice of the plaintiff's title or claim, (*Anon.* 2 Vent. 364, 2d case), previous to the execution of the deeds and payment of the money, *Moore v. Mayhew*, 1 Ch. Ca. 34, *Harwood v. Tooke*, MS. 2 Madd. Ch. 323, otherwise it will not be a complete equitable bar; for if a person had notice of the title though he paid value for it he would not be, in the language of C. B. Gilbert, "a *conscientious purchaser*," et vide *Harrison v. Southcote*, 1 Atk. 538. *Storey v. Windsor*, 2 ibid. 630. *Twenshend v. Ash*, 3 ibid. 237, 238. *S. C. 3 P. Wms.* 307. *Saunders v. Dehew*, 2 Vern. 271. *Blades v. Blades*, 1 Eq. Ca. Abr. 358. *Munsell v. Munsell*, 2 P. Wms. 681. *S. C. Ca. Temp.* Talb. 260. Fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud would not be put in issue, and the plea would not in itself constitute a complete bar. *Harris v. Ingledew*, 3 P. Wms. 91. *Redes. Tr. on Plead.* 195. 3d. edit. Coop. on Plead. 283. But if notice or fraud thus put in issue be proved by the plaintiff, it will effectually open the plea on the hearing of the cause, though where the evidence of notice is loose, the court will not, it seems, act upon it. 2 Ball & Bea. 301. Thus the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of fraud. *Kenny v. Brown*, 3 Ridgw. P. C. 512, and see 17 Ves. 293. If, however, the plaintiff reply to a plea which has omitted to deny notice, that will cure the defect; 3 P. Wms. 94, 95. 2 Ball & Bea. 202, et vide antea, 553, of this edit. note (U). And it is observable, that if particular instances of notice or circumstances of fraud are charged, the facts from which they are inferred, must also be denied as specially and particularly as charged. *Medir v. Birt*, Gilb. Eq. Ca. 185. *Radford v. Wilson*, 3 Atk. 815; and see *Jerrard v. Saunders*, 2 Ves. jun. 187. *S. C. 4 Bro. C. C.* 322.

*Purchaser,
what and who.*

Mortgagees, lessees, and persons taking under a marriage settlement, are purchasers to whom the plea under consideration is available. *Walwyn v. Lee*, ubi supra. *Banbury v. Biscoe*, 2 Ch. Ca. 42. *Ashton v. Bretland*, 9 Mod. 59. 17 Ves. 293. *Matthews v. Jones*, 2 Anstr. 506, et vide 2 Sch. & Lef. 147. Finch, 9. 8 Bro. P. C. 291. Toml. ed. Pre. in Ch. 591. A purchaser is defined by the editor of the first volume of the *Abridgment of Cases in Equity*, to be "a person, who innocently, without fraud or surprise, for valuable consideration, acquires a right or interest" p. 353; and Lord C. Manners observes, "I have always thought, that he who has the best right to call for the legal estate, is entitled to this defence." *Medlicott v. O'Donald*, 1 Ball & Bea. 171. But this must be understood as spoken of the best right in *foro conscientie*, as every plea of this kind appears to admit, that the defendant has no legal title, per Lord Eldon, 9 Ves. 33. 4. And it should be observed, that though a purchaser for valuable consideration without notice, is highly-favoured in equity, yet, in some cases, the court will assist against him if it be in furtherance of justice. *Dursley v. Fitzhardinge*, 6 Ves. 251. Mitf. Tr. on Pl. (3d edit.) 226. Coop. on Plead. 288. *Beames's Elem. Plead.* 243. Notice may be denied by either plea or answer, *Coke v. Wilcocke*, Mose. 73. If denied by answer, all diffi-

*Of avoiding
plea by answer.*

A purchaser for a valuable consideration shall hold (a), or take place against a prior voluntary settlement, though he hath express notice thereof at the time of his purchase; such voluntary settlement being made void, against a purchaser, with or without notice, by the 27th Eliz. c. 4. Therefore, if a man make a voluntary deed, and then a mortgage of the same lands, the first deed is fraudulent, as against the mortgagee (D).

Voluntary settlement not binding on purchaser, even with notice.

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(c) *Tonkins v. Ennis*, 1 Eq. Ca. infra. [711. *Saunders v. Dehew*, Abr. 334, pl. 6. Cowp. 280. 711. 2 Vern. 272.—Ed.]
Gardiner v. Painter, Sel. Ch. Ca. 65.

cilities in respect of the plea will be avoided. And it is observable, that the general proposition, that if a defendant answer, he must answer fully, has, for one of its excepted cases, that of a purchaser for valuable consideration without notice. *Stephens v. Gaule*, 2 Vern. 701. *Jerrard v. Saunders*, 2 Ves. jun. 454. 15 ibid. 378. *Leonard v. Leonard*, 1 Ball & Bea. 325. 2 ibid. 303. Indeed Lord North has ruled, that the plea of being a purchaser without notice is a bad plea; that denial of notice can be taken advantage of by way of answer only, *Auon*, 2 Ch. Ca. 161. But the contrary was held before Lord North's time, in *Ashcombe's case*, 1 ibid. 232, and it is now clear, that notice may be denied by either plea or answer. A general allegation in the answer, that the defendant could not be affected by notice in any way, is not a sufficient intimation to the plaintiff, that the defendant intends to rely upon the insufficiency of the notice. *Bennett v. Neale*, Wightw. Rep. 324, (*Tithe Cause*). It is also observable, that if a bill be dismissed after hearing, another bill may be filed suggesting notice, provided notice was in issue in the former cause, but not proved on the one side nor denied on the other. *Williams v. Williams*, 1 Ch. Ca. 252.

It has been said, that this plea is purely an equitable plea, and a bar to an equitable claim only. *Williams v. Lambe*, 3 Bro. C. C. 264, cited 1 Ball & Bea. 171, and *Rogers v. Seal*, 2 Freem. 84. But in *Burlase v. Cook*, 2 Freem. 24, Lord Nottingham held the plea to be good against a legal estate; and in *Parker v. Blythmore*, 2 Eq. Ca. Abr. 79. pl. 1, the Master of the Rolls was of the same opinion. Considering the case on principle, no well-founded reason can be adduced, why the plea should not protect against a legal as well as an equitable claim. Mr. Fonblanque, in his *Trea. on Eq. lib. 2. c. 6. s. 2.* observes, that this plea may be insisted upon, not only where the party has the prior legal estate, but also where he has a better right or title to call for it; and in *Wilkes v. Bodington*, 2 Vern. 599, the same point seems to have been so decided.

Plea protects as well against legal as equitable claim.

(D) As against subsequent purchasers for valuable consideration without notice; there has never been a doubt, but that voluntary settlements, if fraudulent, are completely void. Such indeed was the doctrine of the common law; and nothing can be clearer, than that a case so circumstanced, comes fully within the act of 27 Eliz. cap. 4. In *Senhouse v. Earl*, Lord Hardwicke held a voluntary settlement to be void against a purchaser with notice; and in *Ecelyn v. Templer*, 2 Bro. C. C. 148, Lord Thurlow did the same. So in *Chapman v. Emery*, Cowp. 278, Lord Mansfield held, that the 27th Eliz. made voluntary settlements void, as against purchasers with or without notice.

Voluntary settlement void against purchaser without notice.

But on the other hand, it has been constantly the subject of doubt, whether a purchaser for value with actual notice of the voluntary settlement, will be safe as against such settlement? that is, whether the voluntary settlement shall be good (as in the former case it would be void) against such purchaser? Mr. Fonblanque observes, (1 Fonb. 280. 5th edit.) that "the terms of the second section of the 27th Eliz. c. 4, seem to be sufficiently distinct to confine its operation to such conveyances, as are made with an intent to defraud and deceive subsequent purchasers; but it were difficult to maintain, that a conveyance was made with an intent to defraud

Reasons for considering it good against a purchaser with notice.

Conveyance voluntary, if it pay debts generally.

A conveyance in trust for payment of debts generally, to which no creditors are parties, is a voluntary conveyance; con-

a person who, before he became a purchaser, has full notice of such conveyance, see *White v. Stringer*, 2 Lev. 105, and if the terms of the act do not compel a construction in favour of a purchaser, with notice of a voluntary conveyance, the policy and spirit of the act appear to reject such construction. The policy of the act was to prevent fraud; the construction most favourable to such purpose is, that which excludes all temptation to the practice of it; a voluntary deed is binding on the party, and all claiming under him (as subsequent volunteers, for instance, see 22 Vin. Ab. 16, et seq.) and to allow him to defeat his bounty in favour of a purchaser for valuable consideration *without* notice, is merely to prefer a higher consideration; but to allow a purchase *with* notice, to supersede the claims of a volunteer, seems to encourage a breach of that respect which is morally due to the fair claims and interests of others: it may render the provision of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it." Cases too are not wanting to confirm Mr. Fonblanque in this construction of the act. Thus, in an anonymous case, in 1 Eq. Ca. Abr. 354, pl. 4, it was said, that a voluntary settlement would be good against a purchaser with notice, though not against one without, and in *Doe v. Rutledge*, Cowp. 712, Lord Mansfield observed—"but with respect to voluntary family settlements to be sure, notice varies it much." And in a late case, (*Doe v. Martyr*, 1 New. Rep. 335.) Sir James Mansfield, C. J. C. P. said, he regretted that it had ever been decided, as it was in *Evelyn v. Templar*, that even notice of the prior settlement would not defeat such a purchase. And, lastly, it was expressly determined in *Biscoe v. Banbury*, 1 Ch. Ca. 287. 292, that a voluntary settlement will bind a purchaser, who has merely constructive notice of it.

But now decided that voluntary settlement is void against purchaser even with notice.

Notwithstanding the authority of these cases, the judges of the Court of King's Bench have, in a recent case held, after a minute investigation of the subject, that a voluntary settlement shall be void against a purchaser with notice; for that the statute makes the voluntary conveyance constructively fraudulent; and the purchaser, buying with notice of a fraud, is not by means of the notice converted into a trustee, *Doe v. Manning*, 9 East, 59, et vide *S. L. Powell v. Pleydall*, 1 Bro. P. C. 124. Toml. edit. Lord Ellenborough, however, in delivering the unanimous judgment of the court, could not but say as then advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, without notice of the prior conveyance, 9 East, 71. In a still later case, the rule that a voluntary settlement is void against a purchaser with notice, was confirmed by the Court of Common Pleas, in *Hill v. Bishop of Exeter*, 2 Taunt. 69. 77, citing and agreeing with the case of *Doe v. Manning*. But these cases were decided at law, and it might be thought, that a court of equity would relieve against the hardship of the rule, as settled in the King's Bench and Common Pleas, but a case in equity has determined that a voluntary settlement, though free from actual fraud and meritorious as a provision for relations, is void against a subsequent purchaser for valuable consideration with notice, and whether the voluntary settlement be by conveyance or articles, in either case specific performance will be decreed against a purchaser, for that notice of the contents of a voluntary settlement has no effect even in equity; therefore notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees, to be laid out in other lands to be settled to the same uses was held immaterial, and it was distinctly decided, that there was no equity under a voluntary settlement to prevent a sale, *Buckle v. Mitchell*, 18 Ves. 100. But a person who has made a voluntary settlement cannot, it should seem, maintain a bill for specific performance, which is to defeat that settlement. And it has been held, that a purchaser will have in equity the same rights as at law, under the statute (37 Eliz. c. 4.), and a voluntary settlement as against him cannot stand; but the party who made the settlement has no right to disturb it; as against himself it is valid and binding. When he seeks to get rid of it, the court will not impede him, but it will not assist him, *Smith v. Garland*, 2 Mer. v. 173, and see *Pulvertoft v. Pulvertoft*, 18 Ves. 84, for the same

sequently void against a purchaser for a valuable consideration with or without notice (b) (E).

So, if a man make a conveyance to another in trust, to pay all his debts mentioned in a schedule, and all his other debts : So, if debts are not specified, as to those debts.

(b) *Langton v. Ashley*, Nels. Eq. Rep. 126. *Leech v. Leech*, 1 Ch. Ca. 249.

law. We may, therefore, now consider the doctrine of the text as settled on a permanent footing ; as also, that a voluntary conveyance as such, is constructively fraudulent and void against subsequent purchasers ; and, that therefore to enable a purchaser without notice to defeat a voluntary settlement of lands, he has nothing more to do than to shew that it is voluntary.

As to what shall be deemed a voluntary settlement, it may be laid down as a general rule, that every voluntary conveyance by a man for his own benefit is fraudulent against creditors. *Fitzer v. Fitzer*, 2 Atk. 513, and cited in 2 Ves. 17 ; and see 1 Cox, 446. But a voluntary conveyance of real estate, or a chattel interest in favour of a child, by one not indebted at the time, though he afterwards becomes indebted, will be good against future creditors, though not against purchasers, see *Russell v. Hammond*, 1 Atk. 15, 16, *Holloway v. Millard*, 1 Madd. Rep. 414, *Battersbee v. Farrington*, 1 Swanst. 106, provided there be no particular evidence, or badge of fraud—a power of revocation for instance, *Peacock v. Monk*, 1 Ves. 132, or retention of possession, *Bates v. Graves*, 2 Ves. jun. 293 ; and see *Stileman v. Ashdown*, 2 Atk. 481, and *Lord Banbury's case*, 2 Freem. 8. And as to marriage settlements, if a settlement be made after marriage, it will, as a general rule, be fraudulent and void against all persons who were creditors of the husband at the time the settlement was made, *Middlecomb v. Marlow*, 2 Atk. 530, *White v. Sanson*, 3 ibid. 413, *Watts v. Thomas*, 2 P. Wms. 364, and *Kidney v. Cusumaker*, 12 Ves. 155, unless such settlement contain a provision for debts, *George v. Milbanke*, 9 ibid. 190 ; or is made in pursuance of articles before marriage, *Beaumont v. Thorpe*, 1 ibid. 127 ; or unless it be against a single debt, *Lush v. Wilkinson*, 5 ibid. 387 ; or the debt be secured by mortgage, in which case it would not affect the settlement, *Stephens v. Olive*, 2 Bro. C. C. 90 ; for to do that it seems the party must have been insolvent at the time, *Lush v. Wilkinson*, ubi supra ; and see *East India Company v. Cloud*, Gilb. Eq. Ca. 37 ; but it is observable, that if (with the exceptions alluded to) there are creditors at the time of such settlement, and the settlement is on that account declared fraudulent, the property so settled will become part of the husband's assets, and all subsequent creditors will be let in to partake of it. See *Taylor v. Jones*, 2 Atk. 600.

But see further as to what shall be deemed a voluntary settlement, *Atherly's Trea.* on Sett. Ch. xiii. *Trea. Eq. lib. 1. c. 4. s. 12.* 1 Madd. Ch. 271. *Sug. Trea. V. & P. Ch. xvi. s. 1.* Antea, of this edit. 220, n. (O), adding to this latter note *Johnson v. Lingard*, noticed in *Sug. V. & P.* 561, stated more at large ib. 570, 5th edit. ; et vide *Pulvertoft v. Pulvertoft*, 18 Ves. 92 ; see also postea, 711. 1052, and 1127 ; and note, a voluntary settlement will be good against the settlor, his heir at law, and a volunteer, provided no power of revocation be introduced in the deed. If such power be inserted, it will then become a testamentary writing, if the settlor takes an estate for life under the settlement ; and the volunteer, if the settlement respect personal property, will be subject to the legacy duty on the amount of the benefit he derives from this testamentary writing. See *Attorney-General v. Jones*, 3 Price, 379.

(E) So if a man convey land for the payment of his debts generally, and retains possession of the conveyance, it is considered as fraudulent and void. *Turbach v. Marlbury*, 2 Vern. 510. But in a case where A. brought an action against B. for adultery with his wife, and thereupon B. assigned his estate to trustees, in trust to pay debts mentioned in a schedule, and such other debts as he should name within ten days, and afterwards A. recovered 5000*l.* damages, and filed a bill to set aside the deed, it was held not to be fraudulent ; A. being no creditor at the time the deed was executed, and his debt which was recovered after the execution of the deed being founded in *maleficio*. *Lockner v. Freeman*, Prec. in Ch. 105.

Voluntary settlement, what shall be.

Voluntary settlement with power of revocation, is in nature of will.

When conveyance to pay debts is voluntary and void.

as to all the debts not mentioned in the schedule, it is voluntary (c) (F).

(c) *Langton v. Ashley*, Nels. 126. *Leech v. Leech*, 1 Ch. Ca. 249.

Composition deed good, if all creditors execute.

(F) But if the creditors, whose debts are unscheduled, acquiesce in the conveyance, it will be good. *Balfour v. Welland*, 16 Ves. 151, cited etiam, antea, 239, of this edition, n. (T).

A conveyance to pay debts may be, 1st, a conveyance of all the debtor's property, in trust to pay all his debts; 2d, a conveyance of part of his property, in trust for his creditors generally; 3d, a conveyance of all his property, in trust for a few or a portion only of his creditors; and, 4th, a conveyance of part of his property, in trust to pay a particular set of scheduled creditors. The whole of these conveyances are voluntary and void, excepting so far as all the creditors combine to make them good. In a recent case (*Spottiswoode v. Stockdale*, Coop. 105) Lord Eldon took it to be quite clear, that if creditors are to execute a deed of assignment by a time stated therein, and it is provided by the deed, that in case they do not do so, that the deed shall be null and void; in case they do not execute the deed within that time, the deed is void at law. But his Lordship stated it to be the constant course in equity, that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, a court of equity will also act under it, and treat it as valid, whether such creditors have signed it or not; and the bill in the case in question expressly stated, that such creditors as were not included in the schedule, having been requested to become parties to the deed, had in consequence of such application executed the same accordingly;—which shews that Lord Eldon's observations in this case were confined to instances where all the creditors come in under the deed of composition. But, it is observable, that when only a partial set of creditors come in, the deed may be avoided by the residue. As to those however who do execute the deed, the deed will be good, if not avoided by any of the other creditors suing out a commission of bankrupt within two months after the conveyance executed. See antea, 591, of this edition, in *notis*.

Creditor not obliged to accede to composition deed.

In *Aitherton v. Worth*, 1 Dick. 375, a debtor by deeds of lease and release, conveyed his estates to trustees, in trust to sell for payment of his debts generally, should the creditors come in and accept the composition thereby made. The plaintiffs and many others signed the deed, and agreed to accept the composition. Others refused, and, in consequence of such refusal, the trustees declined executing the trust. Whereupon a bill was brought to establish the said deeds, to have the trust estates sold, and the money applied in discharge of the creditor coming in under the deed, subject to two mortgages, then vested in the representatives of one Crewys. Sir T. Clarke, M. It. (who in the course of the arguments frequently called on the plaintiff's counsel to produce an instance of such a suit) observed:—"The debtor, by the conveyance, meant to do justice to all his creditors in general, and not to be partial. But to carry the trust of the deed into execution, for the benefit of those who have signed it, by selling the estates, and applying the money arising from the sale, as prayed, would be acting contrary to what the deed speaks, and certainly was not intended. If a debtor convey an estate to trustees for payment of his debts, and to divide the trust money amongst the creditors in proportion to their debts, it is not obligatory on the creditors to come in and accede to it; neither will it prevent a creditor, who doth not choose to come in, from taking a legal course, or such as he shall be advised for payment of his debt. The court hath no power to prevent him: were I to entertain the suit, and direct an execution of the trusts as prayed, it would in effect be doing so; nay, it would be better to do so; for, after having proceeded at law and obtained judgment, there would be nothing to execute it upon but the body of the debtor. The meaning of the conveyance, as I before observed, was for the benefit of all the creditors, or none. After a week in hearing, I see no cause to alter my opinion; therefore let the bill be dismissed."

He may pursue his legal remedy notwithstanding.

Bill may be filed to make creditors come in or renounce. Semb.

But though a deed of composition will not be valid against creditors holding out, yet it seems a bill may be exhibited by those creditors who come in under the trust deed against those who stand out, to come in or renounce

But although a conveyance be at first fraudulent, the fraud will be purged, if it be afterwards conveyed over upon valuable

Voluntary mortgage made good by subsequent assignment for value.

the benefit of the trust. *Dunch v. Kent*, 1 Vern. 260. And as a general rule, it may be laid down, that courts of equity will assist in enforcing agreements for a composition, if obtained without fraud or misrepresentation. *Pollard v. Husband*, 1 P. Wms. 751. *Cann v. Cann*, *ibid.* 777.

In reference to personal property it has been decided, that if pending a suit by one creditor for his demand, and before execution sued, the debtor assigns over all his effects to trustees for the benefit of all his creditors, under which deed possession is taken immediately upon its execution, such assignment will not be deemed fraudulent within the statute, 13 Eliz. c. 5, although made with intent to delay the plaintiff of his execution, and although the deed be not signed by any of the creditors. *Rickstock v. Lyter*, 3 Maul. & Selw. 371. In this case Bayley, J. observed:—"It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all his debts, and he proposed to distribute his property in liquidation of them. This was not acceded to; for the plaintiff endeavoured by legal process to obtain his whole debt: the obtaining of which would have swept away the property from the rest of the creditors. The debtor, when he executed, was not for the first time adopting a new notion; it had been in contemplation some months before. And this creditor is not excluded by the deed, but will stand to all intents and purposes in the same situation with all the rest of the creditors."

Assignment of personal property for benefit of all creditors, good, if trustees take immediate possession.

If the debtor be subject to the bankrupt laws, that is, if he be a trader, an assignment of his estate and effects for the benefit of his creditors by deed, executed without the assent of his creditors themselves, will constitute an act of bankruptcy; the reason being, that a trader has not a right by deed to place his property under a distribution different from that ordained by the bankrupt laws. *Rust v. Cooper*, Cowp. 629. *Bourne ex parte*, 16 Ves. 148. *Cooke's B. L.* 5th edit. p. 89. And though there be a provision in an assignment of the whole, or nearly the whole of a trader's estate and effects, that the deed is to be void if a commission of bankrupt shall be taken out, or if all the creditors, whose debts amount to 20*l.*, do not sign within a given time, yet still such an assignment, notwithstanding the condition, will amount to an act of bankruptcy. *Dutton v. Morisson*, 17 Ves. 197, 8. So a deed, whereby a bankrupt conveys all his property in trust to be divided amongst his creditors, is an act of bankruptcy, though the creditors with whom such deed is in the first instance concerted, afterwards change their purpose unknown to the bankrupt, and agree to set it up as an act of bankruptcy. *Tappenden v. Burgess*, 4 East, 230. And if partners by deed assign all their partnership effects, &c. to trustees, for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment will be deemed fraudulent and void. *Eckhart v. Wilson*, 8 T. R. 140. So an assignment of a part only of the trader's effects in contemplation of bankruptcy, would, it should seem, constitute that act on the score of fraud, by giving a preference to one creditor to the prejudice of the rest, *Round v. Hyde*, Wats. Partn. 251. *Kettle v. Hammond*, Bull. N. P. 40 a. *Alderson v. Temple*, 4 Burr. 2235. *Herman v. Fisher*, 1 Cowp. 123. et vide 3 Serj. Wils. 47; with this exception only, that it cannot be set up as an act of bankruptcy by those who execute or legally assent to it. *Bamford v. Baron*, cited 2 T. R. 594. *Whalley ex parte*, 1 Smith's Rep. 118. And a creditor who assents to and acts under an absolute bill of sale for the benefit of creditors, but does not sign the deed, cannot afterwards sue out a commission against the debtor on the ground that the absolute bill of sale is an act of bankruptcy. *Shaw ex parte*, 1 Madd. Rep. 598.

Composition deed an act of bankruptcy.

It was the repeated doctrine of Lord Mansfield, that every act done with a view to defeat the bankrupt laws, by giving a preference to creditors, is fraudulent and void; and, if by deed, it is an act of bankruptcy, *Worsley v. De Mattos*, 1 Burr. 467. *Haugue v. Rolliston*, 4 Burr. 2174. *Alderson v. Temple*, ut supra. *Herman v. Fisher*, ut supra. *Hassell v. Simpson*, Dougl. 89. 8 C. 1 Bro. C. C. 99. *Devon v. Watts*, Dougl. 86. *Butcher v. Easto*, *ibid.* 294. But a trader, it seems, may shew a preference to particular creditors,

Except when free from fraud, or the subject of it be a copyhold estate.

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consideration, *bonâ fide* (d). A mortgage made by K. in 1659, by divers *mesne* assignments vested in N.(e); it was objected that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though N. paid a valuable consideration, yet this would not purge the fraud, and make it good against one, who was a purchaser *bonâ fide*, and for a valuable consideration *sed non allocatur*: for Holt, Chief Justice, said, that the first mortgage was good between the parties, and being so, when the first mortgagee assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 Eliz. c. 4, "that no mortgage, *bonâ fide*, and upon good consideration, should be impeached by force of this act, but "it should stand in such force as before the act made;" and if this proviso did not extend to this case, to what case should it extend?

Adequacy of consideration not rigidly investigated in family settlements.

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And if a valuable consideration passes, the court in such case will not enquire rigidly into its adequacy, where the object is a family settlement. Therefore, where the defendant's father (f), some time after marriage, in consideration of an additional portion of 100*l.* paid by his wife's mother (a receipt whereof was indorsed upon the deed), settled an estate of 100*l.* *per annum* upon himself for life, remainder to his first and other sons, &c.

(d) Comb. 222, 249. 3 Lev. 388.

(e) *Andrew Newport's case*, Rep. temp. Holt, 477. S. C. Skin. 423. Et vide *Kirk v. Clark*, Pre. Ch. 275, [*Prodgers v. Langham*, 1 Sid. 133,

and postea, 1127, where the principal case is commented on by the learned author.—Ed.]

(f) *Jones v. Marsh*, Ca. temp. Talb. 64.

provided it be not done under the apprehension of bankruptcy, and the property so conveyed does not exhaust the whole estate, or what remains is not colourably left. *Jacob v. Shepherd*, 1 Burr. 478. *Unwin v. Oliver*, cited ibid. 481. *Small v. Outley*, 2 P. Wms. 428. *Manton v. Moore*, 7 T. R. 67. *Compton v. Bedford*, 1 W. Bl. 362. *Law v. Skinner*, 2 ibid. 996. And note, the fraudulent surrender of a copyhold estate in favour of a particular creditor, will not constitute an act of bankruptcy under the statute 1 Jac. 1. c. 15. s. 2, because it does not defeat or delay creditors; the copyhold being neither liable to a *ieri facias* nor to an *elegit*. *Cockshot ex parte*, 3 Bro. C. C. 508. But Mr. Christian questions this decision in his *Treatise on Bankrupt Laws*, vol. i. p. 150. The word "conveyance," so deliberately used in the statute, should, in his opinion, comprehend a conveyance of a copyhold estate; and, he observes, that if the reasoning adopted in the above case were to prevail, "a fraudulent assignment of debts," or of "money in the funds, would not be an act of bankruptcy." As to the former, viz. "debts," Mr. Christian refers to *Richardson ex parte*, 14 Ves. 186; as to "money in the funds," the objection does not seem to assist Mr. Christian's argument, since no decision is brought forward to support the proposition, that an act of bankruptcy could be supported upon such a transfer.

On the subject of this note, the following particulars remain to be mentioned:—A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debt expressed in the deed, is good, as

Other matters as to composition, deed and bankruptcy.

and the mother of the defendant's father having an interest in this estate, joined with him in the conveyance; and the father, thirteen years afterwards, mortgaged this estate, with the usual covenants to the plaintiff, and died, the plaintiff brought his bill to foreclose: and the question was, whether the settlement should be looked upon as voluntary and fraudulent against a creditor, who lent his money so many years after? *Et per curiam*. The question is, whether this be a voluntary conveyance or not? here is plain proof that 100*l.* was paid, the receipt being indorsed upon the back of the deed for a consideration of 100*l. per annum*; yet in marriage settlements, things are not to be considered so strictly, there being room for bounty; and every man ought to provide for his wife and family. Besides, in this case there was an estate which moved from the defendant's father's mother, and she might in some respect be considered as a purchaser of the limitations made to her grandchildren; so that it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which could not be called voluntary against a creditor, who lent his money thirteen years after (c).

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against the grantor and his heirs, but void as against a purchaser. *Leach v. Leach*, 1 Ch. Ca. 249. But to enable a purchaser to set aside a deed made for payment of debts, he must, it is conceived, be a purchaser for valuable consideration, and have no notice of the deed of trust. See *Langton v. Tracy*, 2 Ch. Rep. 16. S. C. Nels. 126. A security, voluntarily given by a trading debtor to a particular creditor, in contemplation of an act of bankruptcy, is void, *Litten v. Bartlett*, 38 *Erj. Wils.* 47, *Wilson v. Balfour*, 2 Camp. 379; but if the creditor be very urgent for payment of his debt, the security will be good. *Smith v. Payne*, 6 T. R. 152. *Crosby v. Cronch*, 11 East, 256. *Hartshorn v. Slodden*, 2 Bos. & P. 582. *Bayley v. Ballard*, 1 Camp. 416. *De Tusset v. Carroll*, 1 Stark. 88. *Reed v. Ayton*, 1 Holt, 303. And where a conveyance was in trust to satisfy an urgent debtor, and then for relatives, the security was considered good as to the creditor, but void so far as it sought to prefer the relatives. *Morgan v. Horsman*, 3 Taunt. 241. But where a debtor gave a pressing creditor a bill of sale of all his property, and immediately became bankrupt, this was held a voluntary preference, and void. *Thornton v. Hargreaves*, 7 East, 544. If a creditor obtain a mortgage, with notice of a composition deed, his security will be fraudulent and void against the creditors under that deed; but if the composition goes off, and the debtor, four months afterwards, becomes bankrupt on an act not contemplated at the time, the security will be effectual against the assignees in bankruptcy. *Wheelright v. Jackson*, 5 Taunt. 109.

(G) So in *Stileman v. Ashdown*, 2 Atk. 478, it was held, that a settlement in 1694 being in consideration of a portion paid at the time, though made after marriage, could not be impeached by subsequent creditors. *Et vide* 8 L. in the cases referred to in Mr. Sanders note (1), 2 Atk. 480. As to a settlement after marriage, in consideration of a parol agreement before marriage, see *Dundas v. Dutens*, 2 Cox's Rep. 235. But see also *Spurgeon v. Collier*, 1 Eden, 62, and the cases referred to in the note there.

CAP. XV.

[682] TO WHOM LANDS FORFEITED, UNDER A MORTGAGE, SHALL BELONG, IN CASE OF THE DEATH OF THE MORTGAGEE.

Formerly doubted whether money belonged to heir or executor of mortgagee.

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Now settled that it belongs to executor.

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Mortgage, personal estate, unless mortgagee direct otherwise.

GREAT doubts were formerly entertained, when a mortgage was made upon condition, that if the mortgagor, at a certain time, paid a certain sum to the mortgagee, his heirs, executors, or administrators, then the mortgagor should re-enter (*a*), and the day passed without payment, and the mortgagee died, whether the money should be paid to the heir or executor of the mortgagee? And a distinction was taken between cases (*b*), where there appeared to be a bond for payment of the money, and the condition of redemption was upon payment to the executors without naming the heir: and those where the mortgage was in fee (*c*), and there was neither bond nor covenant for payment, or where the condition of redemption was, upon payment to the heir or executor, or heirs and assigns of the mortgagee, and there was no deficiency of assets to pay creditors. For, in the latter cases, the money was decreed to the heir, in the former to the executor; because, upon these circumstances, the court determined whether the mortgagee meant to change the nature of his property, from personal into real (*d*). But, since courts of equity have considered contracts on mortgages as merely personal, it hath been settled otherwise; and now it is a rule, in *all cases*, that the mortgage money shall be deemed part of the personal estate, and belong to the executor or administrator, *unless* an intention be declared by the mortgagee, or it appears evidently, from his conduct, that it should not be so considered; as if he foreclose or obtain a release of the equity of redemption, and get actual possession of the premises.

Thus (*e*), where B. lent C. 500*l.* upon a mortgage by lease and release, and it was agreed, by a separate indenture, that if

(*a*) Vide *Pawlett v. Attorney-General*, Hard. 467.

(*b*) 1 Eq. Ca. Abr. 326, pl. 1, 2. 1 Ch. Ca. 88. 2 *ibid.* 187.

(*c*) *Tilly v. Egerton*, 1 Ch. Rep. 181.

(*d*) *Turner v. Turner*, 2 Ch. Rep.

155. *Turner v. Crane*, *ibid.* 242. S. C. 1 Vern. 170.

(*e*) *Thornborough v. Baker*, 1 Ch. Ca. 283. *Noy v. Ellis*, 2 *ibid.* 220. 2 Vent. 348. Hard. 467. *Canning v. Hicks*, 2 Ch. Ca. 187, *infra*, 689. *Wynne v. Littleton*, 2 Ch. Ca. 51, 52.

C. should, during his life, pay B., his heirs, executors, administrators, or assigns, 30*l*, by half-yearly payments, at Lady-day and Michaelmas; and if the heirs of C. should, within six months after his death, pay to B., his heirs, executors, administrators, or assigns, the said sum of 500*l*. then the lease and release to cease and be void. C. died, leaving other assets, and default having been made in payment, and the premises being thereby forfeited, the mortgage lands descended to his son. On a bill exhibited for redemption, the principal question was, whether the mortgage money should be paid to the heir, or to the personal representative? And it was decreed (by Lord Keeper Finch) that it should be paid to the latter; because the reason of the common law, in these cases, ought to be followed, in equity, as nearly as might be. And, at common law, if conditions or defeazances of mortgages were so penned as to make no mention either of heirs or executors, the money ought to be paid to the executors; for it came out of the personal estate, and therefore ought to return thither again; {it being equitable, *that the satisfaction should accrue to that fund which sustained the loss* (A)}. But where the defeazance appointed the money to be paid to the heirs or executors, *disjunctively*, if the mortgagor paid the money precisely at the day, he might elect to pay it to either of them (B); for that would have been a performance of the condition, which was all he had to do. But, when the precise day was passed, and the mortgage forfeited, all election was gone in law; for, *in law, there was no redemption*. And when the case was reduced to an equity of redemption, it would be perfectly against equity to revive the election of the mortgagor; because that would only tend to a delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And, to say that the election should be in the court, would be to place an arbitrary power therein, which would tend to the inconvenience of the subject; since no man could safely pay the money, in such cases, without a suit in equity. And therefore, since there ought to be a certain rule, a better could not be chosen than to come as near as might be to the rule and reason of the common law; and as the law always gave the money to the

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Money paid at day may be paid to heir or executor.

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(A) These words are not in the report; they are added by the author. The maxim is *qui sentit commodum sentire debet et onus*. 1 Co. 99.

(B) If, however, he pay it to the heir, it will nevertheless belong to the executor, for whom the heir will be a trustee, *postea*, 688, et vide further on the same subject, *antea*, 271, of this edition, note (N).

Nature of mortgage.

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Mortgage, and conveyance with agreement to re-convey, distinguished.

executor, where no person was named, or where the election to pay, either to the heir or executor, was gone and forfeited in law (in which latter case, it was the same as if neither heir or executor had been named in the condition) so equity, following the rules of the common law, ought to give it to the executor. For, in natural justice and equity, the principal right of the mortgagee was to his *money*, and his right to the *land* was only as a deposit or pledge for it; therefore, the money ought to be paid to the proper hand that the mortgagee had appointed receiver of it, which was his executor. And then the heir, who was only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for, though the heir had the use and benefit of the land, until redeemed, yet he had it only as a pledge; consequently, was a trustee to restore it when the money was paid to the proper hand; and the heir himself, though he was proper to keep the pledge, being land, yet was not proper to receive the money, being purely personal. Nor was it hard that the heir should part with the land without having the money that came in lieu of it, because the money was originally parted with from the personal estate, and would have immediately come into the hands of the executor, had it not been placed out in real security; and the right to receive a sum of money the payment of which was a personal duty independent of the condition of the mortgage deed, ought always to be certain, not variable upon circumstances. Therefore it was not material, in this case, that the personal representative had assets without this money; for assets or not assets was not the measure of justice to executor or administrator, but served only as a pretence to favour the heir, who either ought to have the money, if there were no assets, or ought not to have it, although there were. For the same reason it was not material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money; for though the case of the administrator of the mortgagee would have been stronger with it, yet it was strong enough without it. In this case, a distinction was taken between a mortgage, and an absolute conveyance with a collateral agreement to re-convey upon re-payment of the purchase money; and the court said, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee, in his life-time, or by his last will, did otherwise declare and dispose of the same (*f*).

(*f*) [This case is also fully reported in 11 Vin. Abr. 147 to 152.—*Ed.*]

So, where a mortgage was made in fee, and descended to the heir at law of the mortgagee, which heir at law had been paid the money ten years before application made for it, by the personal representative of the mortgagee; on the latter exhibiting his bill, he had a decree for it, but without interest (g).

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Heir having received mortgage money, decreed to pay it to executor.

And if the mortgage be in fee (h), conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, in consequence of which, the mortgagor has his election to pay the money to either; yet it will belong to the executor.

Heir trustee for executor before mortgage forfeited.

And if there be several executors, any or either of them may, before probate of the will as well as after, receive and give a good discharge for the money (i).

Receipt by one of several executors before probate, good.

So, in all mortgages in fee, a man's heirs are his trustees for his executors (k).

Heir in every event trustee for executor; though executor have a specific legacy.

The bequest of a specific legacy to the executor, was held not to bar him of money due on mortgage (l). Thus, where a mortgagee in fee, after devising several legacies, gave 100*l.* to his executor, expressly willing, that he should not be paid until after his debts and other legacies were discharged; it was argued, in favour of the heir at law, that it was a necessary implication that the executor should have no more than the 100*l.*; for it was the same as if he had expressly devised the 100*l.* out of the residue of his estate, after his debts and legacies paid; from which it might be strongly inferred, he meant no more than that sum, and not the whole residue. But the court decreed against the heir (c).

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(g) *Turner's case*, 2 Vent. 348.

(h) *Kendall v. Mickfield*, Barn. 50.

(i) *Sir Thomas Littleton's case*, 1 Vent. 351.

(l) *Canning v. Hicks*, 2 Ch. Ca. 187. S. C. 1 Vern. 412. Sed vide

(j) *Austin v. Executors of Dodwell*, 1 Eq. Ca. Abr. 319.

14 Geo. 2. c. 20. s. 9.

(C) It is now clearly settled, that a pecuniary legacy bequeathed to an executor will alone afford a sufficient ground for depriving him of the residue. As to the surplus undisposed of, the executor will by such legacy become a trustee for the next of kin. *Gibbs v. Rumsey*, 2 Ves. & B. 294. *Bull v. Kingston*, 1 Meriv. 314. This, it is presumed, is what the learned author alludes to in his reference to the 9th section of the statute 14 Geo. 2. c. 20; a statute which directs "the undivided surplus of estates *pur autre vie* to be applied and distributed in the same manner as the personal estate of the testator or intestate." But, because the executor does not take the mortgage money beneficially, it does not follow that it therefore goes to the heir. The heir is a trustee for the executor as to the legal estate in the land, and the executor a trustee for the next of kin as to the beneficial interest in the mortgage money. This, it is conceived, is the correct mode of expressing the law.

Legacy to executor debars him from surplus.

Heir of mortgagee decreed to convey estate to mortgagee's administrator;

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though he be administrator de bonis non, if mortgagee be not in possession as owner;

And, if the mortgagor doth not redeem (*m*), the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator; for as the money, being part of the personal estate, would have gone to him, so would the land, which was in lieu thereof.

So, where a mortgage was made of a copyhold (*n*) by a surrender thereof to P., who was admitted tenant, and died in 1690, leaving T., her son and heir and executor; T. entered and was also admitted, and afterwards, by his will, but without any surrender to the use thereof, devised it to G., who was also administrator *de bonis non* to P.; then G. exhibited his bill against K., who was heir at law both to P. and T., and who claimed this as a real estate, it having been so long since forfeited, two descents having been cast, more being due thereupon than the value of the estate, the mortgagor, by answer, having refused to redeem and submitted to be foreclosed, and the devise by T. to the plaintiff being void, at law, for want of a surrender to the use of the will. But it was decreed to the plaintiff, as administrator *de bonis non* to P.; and the decree was affirmed upon appeal, there being no foreclosure nor release of the equity of redemption, in the life-time of the mortgagee.

or though equity of redemption be released to heir, or foreclosed or barred by time.

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Although a mortgagor (*o*), the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the benefit of that estate [and release], even though there be no debts. And so it is in case a mortgagor be foreclosed [after the decease of the mortgagee], or in case the mortgage be of so ancient a date, as in the ordinary course of the court, it be not redeemable (*p*); *for, in case the mortgagee be not actually in possession* [as owner], *it will be looked upon to be personal estate* (*q*).

(*m*) *Ellis v. Gnavas*, 2 Ch. Ca. 50. *Canning v. Hicks*, supra, 689.

(*n*) *Tabor v. Grover*, 2 Vern. 367. S. C. 1 Eq. Ca. Abr. 328, [and

2 Freem. 227.—Ed.] *Wood v. Nosworthy*, cited 2 Vern. 193.

(*o*) *Audley v. Audley*, 2 Vern. 193,

(*D*) As to this, see antea, 408, et seq.

Heir of mortgagee may pay money to executor, and take benefit of foreclosure.

(*E*) So in *Fisk v. Fisk*, Prec. in Ch. 11, it was held, that a mortgage, though forfeited, and though the heir bought in the equity of redemption, and though there were no defect of assets, should belong to the executor. But it was held, that if the heir had been in by descent of such forfeited mortgage when he bought the equity of redemption, and there had then been no defect of assets, equity would not have taken it from him. If the land be worth more than the money, it seems the heir may well say to

And, where there was husband and wife (p), and the wife, having a mortgage in fee of a copyhold, died leaving issue, which issue was admitted and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted.

Husband administrator of his wife, entitled to her mortgage of a copyhold estate, though her heir be admitted.

So, a mortgage of an inheritance, to a citizen of London (q), hath been held to be part of his personal estate, and divided according to the custom.

Mortgage in fee part of free-man's personal estate.

But if a mortgagor agrees to convey his equity of redemption to the mortgagee (r), and [the mortgagee] dies before the agreement is executed, the heir of the mortgagee shall have the money [in preference to the administrator] (F).

Heir of mortgagee takes benefit of his ancestor's contract.

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But, if the possessor of the estate apprehends himself to hold it in fee, his interest will not be considered as personal, against his evident intention. As, if a mortgaged estate be sold by the mortgagee, to a third person, who means to realize, but is deceived in his purchase; the money paid by him will, on repayment, go as the estate would have done. For, in this case, the intention of the vendee is to alter the nature of his property, and to invest his personal estate in the purchase of land; and therefore the court will consider it as *land*, when, by an accident, his intent would otherwise be frustrated. Thus, where a mortgagee in fee entered (s), and after seven years enjoyment, sold the lands absolutely to I. S. and his heirs; the court decreed, that the estate should not be looked upon to be a mortgage, in the hands of I. S., so as to make it part of his personal estate, but should be deemed real property for the benefit of his heir.

Mortgagee seven years in possession sells to A., who dies, A.'s heir preferred to his executor.

So, if it appears to be the intention of the mortgagee, that the mortgage should pass, by devise, as a real estate, the executor will not be entitled (t). As, where the testator (u), having

Executor not entitled against mortgagee's intention to devise land as real estate.

(p) *Turner v. Crane*, 1 Vern. 170.

(q) 1 Ch. Ca. 285. 1 Vern. 4.

(r) *Tilley v. Egerton*, 3 Ch. Rep. 35. 63.

(s) *Cotton v. Isles*, 1 Vern. 271. [S. C. 1 Eq. Ca. Ab. 273, pl. 2. Ibid.

328, pl. 6, and Barn. Ch. Ca. 46.—Ed.]

(t) *Martin v. Moulin*, 2 Burr. 969, infra, 694.

(u) *Noys v. Mordaunt*, 2 Vern. 581. S. C. Gilb. Ch. Rep. 2. Pre. Ch. 265.

the executor, "I will pay you the money, and take the benefit of the foreclosure to myself." *Clerkson v. Bowyer*, 2 Vern. 67. Mr. Fonblanque adds, "Query, whether the heir could compel the executor to take the money before he had foreclosed?" See 2 Fonbl. Tr. Eq. 285, 5th edition.

(F) In the 4th edition this point is erroneously stated and referred to. The above corrected paragraph is sanctioned by the report.

[693] several mortgages, and among the rest, a mortgage in fee of lands in F., devised his mortgages to his two daughters, their executors and administrators, and his lands in F., upon which he had entered upon forfeiture of the mortgage, to them and their heirs; M., one of the daughters, dying without issue, H. her husband and administrator, claimed a moiety of the lands in F., as part of his wife's personal estate, it being a mortgage not foreclosed, or the equity of redemption released. But it was held, that, although it was a mortgage, as between the mortgagor and mortgagee, yet the testator's intent was, that it should pass to his daughters, as a real estate to them and their heirs, and not as part of his personal estate; and that M., the wife of H., being dead without issue, it descended and went to her sisters, as her heirs at law; and that H., as administrator to his wife, ought not to have any part thereof as personal estate (G).

Except assets
fall short.

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Mortgage will
not pass as
land under de-
scription ap-
plicable to it in
point of loca-
lity merely (H).

But where a mortgage was devised as real estate, after a decree of foreclosure *nisi*, it was held to be personal estate for payment of debts (x), if assets fell short, though considered as real estate between deviser and devisee.

But a mortgage will not pass as land under a general description, applicable to it in point of locality, if there be other circumstances sufficient to shew, that the owner considered it as personal property.

Thus where A. B., and R. B. his wife (y), entitled to certain copyholds of inheritance, situated in the manor of Wyke Regis, surrendered the same to W. on mortgage, and the mortgagee entered thereupon, and was in possession at the time of his death; the money was not paid according to the condition of the surrender, and the equity of redemption of the estate was not foreclosed or released during the life of W. But W. surrendered the estate, and divers other copyholds in the said manor, and after describing several other copyhold estates, the surrender proceeded thus, "*ac etiam un' claus' pastura de novo*

(x) *Garrett v. Evers*, Mos. 364.

(y) *Martin v. Mowlin*, 2 Burr. 969.

(G) "The same not being devised as a mortgage but as lands of inheritance, but if there are any other lands contained in the mortgage, which are not within that distinction, then that such lands ought to be taken as the testator's estate of inheritance not devised or disposed of by the will, and that the profits thereof ought to be applied as lands not devised by the will." Reg. lib. 1706. B. fol. 370, per Mr. Raithby's very valuable edition of Vernon.

(H) The case of *Martin v. Mowlin*, has been considered on other points, in a former note. See *antea*, 267, of this edition, n. (L).

inclusum, continen' per extinctionem duodecim acras, &c. &c. (describing the premises in question.) *Nec non totum statum jus titulum interesse clam' et demand', quaecunque predict' W. tam in lege quam in equitate de et in præmissis predict', et qualibet in de parte et parcella ad opus et usum predicti W. pro termino vitæ suæ, et post ejus decessum, ad opus et usum talis personæ sive personarum cui vel quibus et pro tali statu sive statibus qual' ipse predictus W., per ultimam voluntatem suam aut per aliquod aliud scriptum, sub manu et sigillo predicti W., dabit, devisabit, limitabit, declarabit sive appunctuabit ; et pro defectu talis donationis devisamenti limitationis declarationis sive appunctionis ad opus et usum rectorum hæredum ipsius W. in perpetuum secundum consuetudinem manerii predicti. Super quo, ad istam eandem curiam venit predictus W., et cepit de dominiis et firmar' predictis præmissa prædicta superius sursum reddita cum omnibus et singulis eorum pertin', habend', tenend' omnia et singula præmissa prædicta cum suis perti' præfato W., pro termino vitæ suæ, et post ejus decessum, tali personæ, sive personis cui vel quibus, et pro tali statu sive statibus qual' ipse predictus W., per ultimam voluntatem suam, aut per aliquod aliud scriptum sub manu et sigillo suis, dabit, devisabit, limitabit declarabit sive appunctuabit, prout superius limitatur et pro defectu inde, rectis hæredibus ipsius W. in perpetuum, secundum consuetudinem manerii predicti: SUBJECT' tamen separatibus CONDITIONIBUS in quibusdam copiis rotulorum cur' manerii prædict' mentionat quarum separat' dat' sunt prout sequen, &c. &c."*

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Afterwards W. made his will, and therein, after a variety of devises and bequests, proceeded thus: "And whereas R. B., widow, stands indebted to me, in a considerable sum of money, I do hereby appoint and give her twelve months time after my death to pay the same, and do give her 50*l.* to be allowed out of the same debt." And then proceeds, "*Item, ALL my lands, tenements, and hereditaments, WITHIN, AND PARCEL OF THE SAID MANOR OF WYKE REGIA, and also all other my lands, tenements, and hereditaments, in the county of Dorset (charged as above-mentioned) I do give and devise unto my son H. W., and unto A. his now wife, and to the heirs of the body of my said son, H. W., on the body of the said A. lawfully begotten, and, for default of such issue, unto my right heirs for ever. Item, I give and bequeath to my said son H. W., all my goods and chattels, and personal estate whatsoever; he paying my debts, and legacies, and funeral expences.*" And one question,

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necessary to be decided, was, whether the testator meant to devise this mortgage, as part of his real or personal estate? *Et per* Lord Mansfield, as to the construction of the will of W., if it appeared that the testator really meant and intended to devise the mortgaged premises as land, it would then be a devise of land; the mortgage being forfeited by law, and the estate in the land become absolute. But if it appears that the testator meant and intended it as a bequest of money only, then it would be considered in a court of equity, as a specific bequest of the money: and a court of equity would not direct the money to be laid out in land, without express words in the will to ground such direction upon. It seems to me, that the testator all along understood this to be part of his personal estate, and that he meant to dispose of it as such by his will. He surrendered it as charged *with a condition of redemption and resurrender*. And in his will, he manifestly considered it as a debt due from Rachel Buckler, and that debt as part of his personal estate. Though the testator has not in his will mentioned this estate to be redeemable, yet he has done so in the *surrender to the use* of his will, he surrenders it as liable to a condition in equity (for at law it was become absolute) and there had not run above eight or nine years upon this mortgage, when he made this surrender; so that he appears to have made the surrender of it, only to substantiate his claim upon the estate, and upon the face of the surrender plainly considered it as *redeemable*. And so he did in his will too. We must take it upon the will, that the widow B. owed him no other debt but this: *de non existentibus, et de non apparentibus eadem est ratio*. He gives her time to pay it; he gives her a specific legacy out of it; he gives it as a debt towards payment of his debts and legacies: "I give and bequeath to my son H. W., all my goods, chattels, and personal estate whatsoever, he paying *my debts, legacies, and funeral expences*." And there is nothing to control this, but the general words, "all my lands, tenements, and hereditaments, within, and parcel of the said manor, &c." But his *creditors* and *legatees* had a right to have it considered as *personal* estate. Therefore, we all agree in opinion, "that he meant to pass it as a DEBT:" and there is no colour to imagine, that it could be considered in a court of equity, as a specific bequest of money, which they would direct to be laid out in land.

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And, where money secured by a mortgage (to which the executor was legally entitled) was articulated to be laid out in

Mortgage money articulated to be laid out in

land (z), and settled on the issue of the marriage, it was by Hale, Chief Justice, on a special verdict, adjudged to be bound by the articles.

land; considered as land.

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No survivorship between joint mortgagees.

If two persons advance a sum of money on mortgage (a), and take the mortgage to themselves *jointly*, without inserting in the deed the words *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the court presumes this to be the intention of the parties (1).

Thus, where N. and S. lent 2000*l.* to G., on mortgage (b), 1450*l.* whereof was the money of S., and 550*l.* the residue, the money of N., and it appeared, by a note under both their signatures, that the 1450*l.* was delivered by S. to N., and that, if the mortgage was paid off, then the 1450*l.* with interest thereon, was to be re-delivered into the hands of S., for the uses of his will. Afterwards, and before the day of redemption, S. made his will, retiting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to N., S. being dead, and he claiming it by survivorship. But, on a bill exhibited

On redemption each shall have the money he advanced with interest (x).

(z) *Lawrence v. Beverly*, cited 3 P. Wms. 217, [and in 1 Vern. 471, stated also in *Baden v. Pembroke*, 2 Vern. 55, and reported 2 Keb. 841. In what cases money covenanted to be laid out in land, is considered in

equity as real estate; see 1 Fonb. Trea. Eq. 420, 5th edit.—Ed.]

(a) 2 Ves. 258.

(b) *Petty v. Steward*, 1 Ch. Rep. 31. 1 Eq. Ca. Abr. 290. Et vide 2 Ves. 258. [3 Ves. 631, and 1 Atk. 467.—Ed.]

(I) This shews the utility of the clause in the common forms, declaring when money is advanced by trustees, that it is advanced by them as joint-tenants on a joint account. And it is observable, that if lands are mortgaged to A. and B., and A. only pays the money, the intention being that B. should take nothing, B. will be a trustee for A., and compellable to release when called on. Cary's Rep. 19. And in an anonymous case in Carthew, p. 16, it appears to have been held, that joint mortgagees are trustees for each other.

Joint mortgagees trustees for each other.

(K) In reference to purchasers the rule is, that if two persons buy an estate, and pay equal proportions of the consideration money, taking a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor will be considered but as a trustee for the other, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies, this will be a lien on the land, and a trust for the representative of him who advanced it. Per Master of the Rolls, in *Lake v. Gibson*, 1 Eq. Ca. Abr. 291, pl. 3. S. C. 3 P. Wms. 158, sub nomine *Lake v. Craddock*. The maxim among merchants and traders, is *ji s accrescendi inter mercatores pro beneficio commercii locum non habet*. Et vide, for further cases on this subject, 2 Bridgm. Index, 3d edit. tit. *Local Cust. ms.*, p. 274.

No survivorship if money paid in unequal shares.

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marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death, but her jointure, which she herself concurred in destroying. But, if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent the wife from claiming dower out of any other lands, whereof her husband was seised during the coverture; because, the jointure being no bar of dower, the wife had her election on her husband's death, either to accept of the jointure, or to claim her dower. And therefore Sir Edward Coke says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

And every interest she may have in land.

And if a married woman join her husband in a fine, it will bar her of any particular interest she hath in the lands comprehended therein, as well as from claiming dower, or a jointure out of those lands.

Wife's interest in husband's judgment barable by fine.

Thus, where a man, on his marriage (d), entered into a bond for 600*l.* to a trustee, with a warrant of attorney to confess judgment thereon, to be defeasible on the payment of 300*l.* to his wife, if she should survive him, and the wife afterwards joined the husband in a fine of all his lands; it was resolved, that the fine not only bound the wife from claiming dower out of the lands, but destroyed her interest in the judgment. And the Lord Keeper decreed, that the wife should procure satisfaction to be acknowledged on the judgment.

Wife may incumber her dower or jointure.

And as a wife may, by levying a fine, absolutely bar herself of her dower or jointure; so may she thereby charge or incumber her interest therein.

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Agreement that wife shall redeem good, notwithstanding fine.

But in such case (e), where [the wife joined her husband in a mortgage, and levied a fine to the intent to bar her dower, and] the husband agreed that she should have the redemption of the mortgage; in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, the husband and wife being both living, the court decreed, that after the husband's decease, the wife, in case she should happen to survive him, should enjoy her dower.

Except against creditors, and then subject to such creditors.

But the husband having in this case mortgaged the estate twice more (f), such agreement was held fraudulent against the subsequent mortgagees, so far as it entitled the wife to the whole equity of redemption. But, notwithstanding the mort-

(d) *Goodriok v. Sherbolt*, Pre. Ch. 333. S. C. by the name of *Shotbolt v. Biscoe*, Gilb. Eq. Ca. 18.

(e) *Dolta v. Colman*, 1 Vern. 294.
(f) *Ibid.*

gagées pressed that the decree might only be, that she should enjoy her dower notwithstanding the fine, the court thought it unreasonable to put the wife to her writ of dower, because they might convey away the estate, and she not know against whom to bring it; and therefore decreed the dower to her (c).

(C) In the case of *Jackson v. Parker*, Amb. 687, Sir T. Sewell, M. R. laid hold of the circumstance of the equity of redemption being limited to the husband and wife jointly, to infer an intention, that the wife should in equity retain her right to dower subject to the mortgage debt. In that case Sir John Jackson, tenant in tail of the lands in question, made a mortgage by lease and release and fine, in which his wife joined, to Frances Stubbs, and in which there was contained a proviso, that if the said John Jackson and Esther his wife, their heirs, executors, administrators, or assigns, should pay the mortgage money and interest, then Frances Stubbs, her heirs or assigns, should re-convey the premises to the said John Jackson and Esther his wife, their heirs or assigns; and there was a clause at the end of the deed which declared the uses of the fine to be (subject to the payment of the mortgage money and interest) to John Jackson, his heirs and assigns. Upon a question as to what interest the wife took in the equity of redemption on this mortgage, it was argued, that the court would put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made: that the husband was the owner of the estate, and the intention of the deed was merely to make a mortgage; and that the wife was made a party and joined in the fine for the sake of the mortgagee, and for no other ulterior purpose. Sir Thomas Sewell adopting this argument, was of opinion, that, notwithstanding the language of the proviso, there was no room to presume any contract between the husband and wife, by which the latter was to take a joint interest in the equity of redemption in lieu of her dower; for that if it had been so, it would have been recited in the deed. And his Honour observed, that the wife's right of dower accounted for her joining in the fine. *The deed was planned as between mortgagor and mortgagee.* The wife had a right to redeem; and if she had redeemed a court of equity would not have taken the estate from her but upon the terms of allowing her dower. The deed had declared the rights of the parties. The uses of the fine were declared after payment of the mortgage money to the husband and his heirs. The wife would then be entitled to dower again, after the money paid, by the husband taking the estate in fee.

Redemption reserved to husband and wife jointly, latter endowable, subject to mortgage notwithstanding fine.

Hence arises the general understanding of the profession, that a fine, although an absolute bar at law, may in equity upon the ground of its having been levied for a particular purpose, be restrained from operating to exclude the widow from her dower, except to the extent of the particular purpose contemplated. And this general opinion is still further confirmed and enforced by the following cases:—In *Goodrick v. Brown*, 1 Ch. Ca. 49, it was resolved, that whereas by a decree of the Court of Chancery, a fine was levied to a particular end and purpose, which would operate further in point of law than to the end which the decree ordered it: it was resolved, that such fine should not be suffered in equity to work farther than the decree intended. On the same principle, in a MS. report of *Mrs. Danby's case*, 2 Eq. Ca. Abr. 385, pl. 2. S. C. Pr. Ch. 34, cited, it is said, "A wife joined with her husband in a fine, in order to make a mortgage, which afterwards was not made; the husband died, and the wife brought a writ of dower, and got judgment by default; and the heir could not be relieved against it in equity as he would have been, if the fine had been a bar of her dower in equity as it was at law." The court must therefore in effect have decided, that the fine was no bar in equity, the particular purpose having failed. It seems however to have escaped observation, that as no mortgage was made, the use resulted to the husband, and consequently the fine was no more a bar at law than it was in equity. In *Naylor v. Baldwin*, 1 Ch. Rep. 130, Richard Baldwin made a mortgage by demise to one Tirrel for securing 400*l.*, lent by Tirrel, and, to confirm the mortgage, Baldwin and

Fine a total or partial bar in equity according to intention of parties.

Fine no bar of jointure, if not so intended on construction of whole deed, preferring first of repugnant clauses to last.
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Notwithstanding these principles, if it appears not to have been the intention of the husband and wife, in levying a fine, to bar the wife's jointure, the fine will not affect it. Thus, where W., and R. his wife (g), being seised of lands to them, and the heirs of W., did, by indenture, bargain and sell the same to P. in fee, subject to a proviso, that if W., or his wife, or the heirs of W., paid 100*l.* to P. at a given day, that then it should be lawful to them, and to the heirs of W., to enter, and to re-have and enjoy, as in their former estate, this indenture notwithstanding; and that then, after such a payment, this indenture, and all other fines and assurances, to be passed between the said parties, should be to the use of W. and his heirs (leaving out the wife here); and lastly, it was agreed thereby, that all fines and assurances, to be made between the parties within seven years following, should be to the uses, intents, conditions, grants, and agreements, before therein expressed, and to no other use, intent, and purpose, &c. The deed was not enrolled. W. and R. his wife, within seven years, levied a fine, according to that indenture, to P. Afterwards W. died. His wife at the day paid the 100*l.* and entered. Then one entered by command of the heir of W., pretending that by the payment of the 100*l.* the fine was to the use of the heirs of W., and not to the wife; but resolved unanimously, *per curiam*, that the wife should have an estate for life; for so was the condition, and the first part of the clause; and the other part of the clause, or middle clause, was not repugnant, but stood well with it, that it should be to the use of the husband and his heirs, and did not controul the limitation to the wife for her life; and when both clauses might, by any construction, stand, it was to be construed accordingly; and the last clause expounded this

(g) *Southcoat v. Manory*, Cro. Eliz. 744.

his wife acknowledged a fine to Tirrel. On a bill in equity for divers matters, the court is reported to have said, "As for Mrs. Baldwin's dower, unless she have barred herself *totally* by levying the fine, the court makes no order therein at present, but declares that if she levied the fine *only to secure the lease* [that is, the mortgage], no debt could bar her, except Tirrel's debt on the lease." The court here evidently refers to the doctrine under consideration, and admits clearly that the fine may operate as a total or a partial bar to dower, according to the intention of the parties.—Whether a corresponding statement can be made as to the operation of a fine in a court of law, the cases do not warrant us in deciding; but no sound reason occurs why a court of law should not adopt this equitable principle, and restrict the effect of the fine to the purpose intended, in the same manner that it restrains the operation of any other species of conveyance. See Co. Litt. 42 a. 183 a. and Cru. Dig. tit. xxxii. c. 19.

For the modern determinations, and the general result of cases, see the next note.

fully, viz. "That all assurances should be to all the uses contained in the indenture," whereof this was one; and that if all the clauses could not stand together, the first should stand rather than the last.

So, where a jointure was settled upon a woman (*h*), issuing out of some houses in London which were burnt down, and she joined her husband in a fine of the houses, to create a long term for raising money to rebuild them, upon an agreement that she should have her jointure out of the reserved rent thereof; it was adjudged, that the fine did not affect the jointure.

Agreement that fine shall not affect jointure, good.

Again, where A., upon a marriage between him and B. (*i*), and in consideration of 500*l.* which she brought as her portion, settled an annuity of 50*l.* per annum on her during her life, issuing and to be paid out of several lands; A. afterwards mortgaged the lands to C., and prevailed with B. to join him in a fine of part of the mortgaged premises; and, upon a bill brought by B. to have the said annuity settled on her as aforesaid, paid in future, and also to have the arrears thereof, it was insisted on the part of A. and C., that, *by the fine* she had extinguished her right to the annuity; but it appearing, upon reading some proofs, and producing deeds, that C. had notice of this annuity before his mortgage, and that it was excepted in the mortgage, and that it was never intended that she should extinguish this annuity by joining in the fine, the Court decreed that the annuity should be paid in future, and all arrears thereof up to the time of the decree (*D*).

Wife's annuity not barred by fine—it being excepted in mortgage deed, and not intended to be destroyed.

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(*h*) *Anon.* 1 Skin. 238. [S. C. nom. *Brond v. Brond*, postea, 763.—Ed.]

(*i*) *Selly v. Whitefield*, Finch. 277.

(*D*) The earliest mention of the doctrine under consideration is to be found in the case of *Cotton v. Cotton*, in the time of Lord Nottingham, 2 Ch. Rep. 72. 138. 8vo. edit. 30 Car. 2. The cause was heard by Mr. Justice Wyndham; and the application of the doctrine of resulting trust appears incidentally in the report of the decree, which contains the following declaration:—"And as to the mortgage made to Perkins by the said Nicholas, and the defendant his relict, it appearing that part of the mortgage lands were, before that mortgage was made, settled on the said Nicholas and Katherine in jointure, or otherwise, so as the same came to her as survivor, this court is of opinion, that the equity of redemption belongs to her as survivor, and not to the plaintiff," who claimed it as the heir to Nicholas her husband.

Earliest case on this head.

The intermediate cases have been previously noticed. See the preceding note. The two recent cases of *Ruscombe v. Hare*, 6 Dow. Parl. Rep. 1, and *James v. Jackson*, 1 Bligh. Parl. Rep. 126, remain to be considered. The rule fixed by the former of these cases is this,—If the equity of redemption be reserved to the husband, upon a mortgage, by fine of the wife's estate, and there is nothing more in the transaction, the courts will hold that no alteration of the previous rights of the parties hath been effected. See this case stated more at large in the note to p. 756, postea.—If, however, other

Fine levied to secure mortgage, does not bar wife of dower. Contra, when.

Joint answer in
Chancery equal
to fine.

And an answer in Chancery by a *feme covert*, has been adjudged as equal to a fine, in binding her trust estate by

circumstances occur, affording evidence of an intended change of ownership, the fine will be held to operate beyond the particular object of securing money, and will confirm the equity of redemption to the person intended to take it. Accordingly in *Iunes v. Jackson*, ubi supra, where the wife joined her husband in the mortgage of her estate by fine, and the proviso was simply, 'that if the husband or wife paid the money at the day the term created by the deed should cease,' and the declaration of the uses of the fine were in an after part of the deed declared to enure 'to the use of the mortgagee during the term, subject to the said proviso; and, after the expiration of such term, to the use of the husband and wife for their lives and during the life of the survivor, and after both their deaths to the use of the heirs of their bodies, and for default of such issue to the use of the right heirs of the survivor of them the said husband and wife,'—it was held, that these latter limitations in the deed were distinct from the transaction of the mortgage, which prevented a resulting trust for the benefit of the heirs of the wife. This case is also stated more fully, *postea*, p. 756, *in notis*. And it is observable, that though the above cases refer more particularly to the wife's estate of inheritance, yet the principle of them, it has been held, is equally applicable to instances, where the wife joins her husband in a fine of her *jointure* lands, or of that portion of her husband's estate which she is or may be entitled to as *tenant in dower*. See 1 Bligh. Rep. 126.

General rule.

The practical rule to be collected from a review of all the cases on this head is, that if the wife concur with her husband in a fine of lands to which she is or may be entitled in right of her dower or jointure, for the purpose of improving the title of a mortgagee, and the mortgage deed contains no limitation of the estate beyond the security, and reserves the equity of redemption to the husband alone, then the fine which the wife has levied to give effect to the mortgage will operate for the security of the mortgagee only, and not absolutely to bar the wife of her dower or jointure as against the husband's heir, volunteer, or purchaser; and this, on the principle, that nothing more appearing on the face of the instrument to have been intended than the primary object of borrowing and securing money, the deed and fine shall operate no further or otherwise. But if the mortgage deed contain a settlement of the property over and beyond the mere purpose of security, as if there be a mortgage for years, or a mortgage in fee, and the proviso for redemption be simply that on payment of the money the term or estate of the grantee shall cease, and afterwards the fine is declared to enure in corroboration of the term or estate of the mortgagee, and then to uses in strict settlement, or to uses which add nothing to the security of the lender of the money, and the persons taking under such uses and limitations are different from those who were entitled to the estate before the mortgage was executed, in such case the fine will operate to bar the wife of dower or jointure to the extent of such uses and limitations, on the ground, that such arrangement was intended and agreed on, with the privacy and consent of the wife, previously to her acknowledging the fine and executing the mortgage assurance, though such agreement may not perhaps be recited in the formal or indeed in any part of the instrument. In general cases an answer to the following question will decide the point:—Has the husband a less or a greater, or the same estate, after the execution of the mortgage, (considering such mortgage as no diminution of his estate,) than, or as he had before the mortgage transaction commenced? If there be no substantial and intended alteration of right, and the husband stands seized in fee, or of his former estate, subject only to the mortgage, dower will result to the wife notwithstanding the fine. But if there be a variation of ownership, and the husband takes the equity of redemption under a modification different from that under which he before enjoyed the estate, such modification being clearly proved (either by the deed itself, or as it should seem by parol evidence, *postea*, p. 759) to have been made with the privacy and consent of the wife, then the widow must submit to be postponed to the uses and limitations which she has intentionally concurred in creating.

her mortgage. Thus (*k*), where an estate was purchased in trust for the husband and wife and their heirs, and the hus-

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(*k*) *Anon. Mos.* 248. Et vide *Ellis v. Atkinson*, 3 Bro. C. C. 565, and cases cited there.

A case which recently occupied the attention of the writer affords an apt illustration of the subject of this note. By indentures of lease and release, dated 11th and 12th November, 1814, between I. P. and Mary his wife of the one part, and I. D. of the other part, reciting a will under which I. P. was devisee in fee, and that he had occasion for the sum of 1000*l.*, which the said I. D. had agreed to lend him on the security after mentioned: It was witnessed, that in consideration of 1000*l.* to the said I. P., paid by the said I. D., the said I. P. conveyed and assured the premises in question unto and to the use of the said I. D., his heirs and assigns for ever, subject to the proviso or condition for redemption thereafter contained: And for barring and extinguishing the dower and thirds which the said Mary the wife of the said I. P. should or might *thereafter* have claim or be entitled to out of the said premises, and for better and more effectually conveying and assuring the same unto and to the use of said I. D., his heirs and assigns, subject to the proviso for redemption thereafter mentioned, the said I. P. for himself and his heirs, and for the said Mary his wife, covenanted with the said I. D. to levy a fine (which was afterwards levied); and it was declared that such fine should enure to the use of the said I. D., his heirs and assigns for ever, subject to the proviso for redemption thereafter contained, viz. that if the said I. P., his heirs, executors, administrators, and assigns, should pay unto the said I. D., his executors, administrators, or assigns, the sum of 1000*l.* with interest, on the 12th November, 1815, then the said I. D., his heirs or assigns, should and would upon the request, and at the costs of the said I. P., re-convey and re-assure the said premises unto the said I. P., his heirs and assigns, or to such other person or persons as he or they should for that purpose nominate or appoint, freed and absolutely discharged of and from all incumbrances committed by the said I. D. in the mean time.

Case in practice, where fine was considered only a partial bar of dower.

A gentleman of much eminence inclined to the opinion, that by this fine and declaration of uses Mrs. P. was *completely* barred of dower. His sentiments were couched in the following language:—"Whether Mrs. P. in case she survives her husband, could redeem against the purchaser, will depend on the intent shewn in the deed declaring the uses of the fine. If the fine was merely to let in the mortgage, I think it clear she might. But the language of the deed goes much beyond the mortgage; for it is declared that the fine is to be levied for extinguishing the right to dower which she *then* had or might *thereafter* have in the premises. It seems to me these words are strong enough to preclude her right to redeem as dowress."

Opinion that it was an absolute bar.

On the other hand it was contended, that "the rule was explicitly defined by Lord Eldon, in *Innes v. Jackson*, 16 Ves. 356. (cited at large, *postea*, 756.), and though that case was over-ruled in the Lords, (1 Bligh, 104.), yet that the rule laid down by the noble Lord, whose decree was reversed was right, the application of it only, being mistaken; that a similar principle prevailed in reference to the doctrines of revocation and renewals, and in all the three instances, the court was guided solely by the intention of the parties apparent on the face of the instrument; that it might as well be argued, that the husband levying a fine to a mortgagee, levied it to him *absolutely*, as that the wife joining in a fine for the further security of a mortgagee, barred herself of her whole title to dower; that the rule being admitted, it was observable on the language of the deed, that the words explained themselves: The sentence alluded to was common form and consisted of two parts, the one answering the other,—not of two sentences, for then each became unintelligible. The right and title of dower was to be extinguished,—for what purpose? The occasions on which the wife joined were sales and mortgages, and therefore the common form was,—if the former, for the purpose of more effectually conveying the estate to the purchaser absolutely;—if the latter, for the purpose of more effectually conveying the premises to the mortgagee *with a proviso*. The wife joined for better securing, &c., but how could she more effectually secure? Only by extinguishing her dower subject to the

Reasons for considering it otherwise.

band and wife joined in a mortgage to the vendor, to secure 500*l.* part of the purchase money; the mortgagees brought a bill of foreclosure, and the husband and wife put in a joint answer; the husband died, and a motion was made for the wife, that she might amend her answer, put in by coercion during coverture, and she insisted on the mortgage not being obligatory on her, because no fine was levied; *sed per* Lord Chancellor, I shall not grant this motion; for though the mortgage is insufficient at law, I shall consider it as a good mortgage, since the wife does not pretend she was any ways

mortgage. That as to the word *thereafter*,—It was not enough to extinguish the dower which the wife *then* had; for that was but inchoate and imperfect, and could add but little to her more effectual assurance: it was necessary to carry the point further, and extinguish her right to dower when perfect and complete, which could only be *thereafter* when her husband was dead. The word “*thereafter*” was a necessary part of the sentence, alluding to a “*thereafter*” during the continuance of the mortgage. That the deed was to be looked at as a thing entire, the disjointed parts could not have an effect separately; for then the husband conveyed *all his estate* which would include his equity of redemption. The object of the deed was a mortgage, What was the consideration? the mortgage-money; What, the consideration to the wife? the loan to her husband. The whole deed proceeded on the idea of a mortgage, no other object was contemplated, otherwise it would have been apparent on the face of the instrument. The wife could not be presumed to have known that the deed was intended to operate beyond a mortgage, when the expression of that intention was omitted. On her separate examination she acquiesced in the security; but it could not from thence be inferred, that she freely and voluntarily consented to give up her dower absolutely. It did not necessarily follow, that because she assented to relinquish her dower for the further security of a mortgagee; that, therefore, she was willing to lose it for the benefit of a purchaser. On that latter point she was not examined when the acknowledgment of the fine was taken. And it was further observed, that there were no uses declared of the fine beyond the mortgage, and many reasons concurred in confirming the opinion, that even during and subject to the mortgage, the use resulted to the husband subject only to the mortgage. If it had been intended to bar the wife of dower absolutely, the form was obvious; namely, to declare the use in confirmation of the mortgage, and then to the usual uses to prevent dower. This form prevented every objection. On the whole, therefore, it was thought (with great deference to the above-mentioned opinion), that it was highly probable, that a bill filed against the purchaser (on whose behalf the title was investigating), by Mrs. P. for redemption, after the decease of her husband (the vendor), would be attended with success.”

References to drafts of deeds in works of eminence where fine would be a partial bar only.

Operation of recovery confined in same manner as fine.

The form of a mortgage by a husband and wife, so as to prevent the claim of dower and the necessity of a second fine, will be added in the Appendix, No. XXIX. On deeds prepared from the precedents, to be found in 5 Wood's Con. p. 614. 8vo. edit., 4 Newn. Con. 502, and 4 Bar. Pre. 388. 397. 1st. edit., it is submitted, that notwithstanding the fine levied in pursuance of the covenants in such drafts of deeds contained, the wife would be entitled to dower; and to bar which, a second fine would be requisite.

In conclusion, it may be useful to apprise the student, that a recovery suffered by the husband, for the further assurance of the mortgagee, wherein the wife is vouched in order to bar her dower, will operate as a bar to dower *pro tanto* only, and not entirely; if it be apparent on the face of the deed leading or declaring the uses of the recovery, that no settlement of the estate beyond the mortgage was intended. See *antea*, of this edition, pages 113 & 114, in *notis*.

imposed on; and an answer in this court has been adjudged equal to a fine (E).

One question, in the case of *Palmer v. Danby* (I), was, whether a dowress had a right to redeem a mortgage [for years (G), made before marriage?] And the Lord Keeper de-

Dowress may redeem whole mortgage and hold over for two-thirds (F).

(I) *Palmer v. Danby*, Pre. Ch. 137. not the same case as that of Mrs. [S. C. 1 Eq. Ca. Abr. 219, and ante, *Danby's case*, mentioned in p. 704, 286, of this edition, n. (S). This is ante, n. (C).—Ed.]

(E) That is, to estopp, the party acknowledging or circumscribing his right, from averring the contrary in time to come. This, it is presumed, is a necessary qualification, to the analogy which is here said to exist between the effect of an answer in Chancery and a fine. Of late, this point does not appear to have occupied the attention of the court—a circumstance which considerably diminishes the general applicability, if not the authority, of the case in the text. An answer in Chancery has been held, a sufficient act to sever a joint tenancy in equity, *Frewen v. Relfe*, 2 Bro. C. C. 224, though not at law, Co. Litt. 184 b, 185 b; and when given in express relation to a power, it has been held such a manifestation of the execution of the power as a court of Equity will substantiate, *Carter v. Carter*, Mose. 365. *Fortescue v. Gregor*, 5 Ves. 553. But that an answer in Chancery is equal to a fine, is a difficult proposition to admit; and seems, indeed, to have been entirely disregarded in *Sedgwick v. Hargrave*, 2 Ves. 56, cited postea, 739, where, if the joint answer of the husband and wife had been equal to a fine, the court would not have hesitated in making a personal decree on the wife, which it did; and in the end held, that the wife was not bound by the answer, nothing appearing on the case to warrant the Master of the Rolls in saying, that she was bound. On an answer in a court of Equity, the wife is not always solely and separately examined, and this forms an additional reason against the admission, at least as clear law, of the doctrine in the text. The wife may, indeed, by actual examination and consent in court, dispose of any reversionary interest she may have in personal property, but even that proposition is unsettled, and does not extend to real estate. "It is presumed," says Mr. Roper, (1 Bar. & Fem. 243.), "that the principle applicable to correct determinations upon this subject is this,—that when property is so given to the wife, either in remainder or contingency, as that the husband may release it at law as in the instance above supposed; if he assign it for value, the assignment will bind the wife in equity; so that her consent, by way of confirmation and to waive her title to a settlement, ought upon such principle to be received and recorded. But that when the wife's consent is offered to pass her reversionary interest in analogy to a fine at common law, in favour of the husband or of his assignee without a valuable consideration, the court must decline to receive it, because no analogy between the two acts exists, they differing both in forms and principles; and because the property is not assignable at law, and there is no consideration to induce a court of Equity to act or interfere."

Effect of answer in Chancery, and consent in court.

(F) Or other proportion, according to the rule laid down in note (M) ante, p. 312, of this edit. But a dowress, like an heir or devisee, has a right to have the personal estate of her husband, as far as it will extend, applied in discharge of mortgages, and other debts contracted by the husband, which are charges on the land whereof the wife is endowable. And even where the personal estate is insufficient to discharge the debt, it should seem that in some cases, if not in all, she will be entitled to the privilege of having the lands which remain in the hands of the heir charged therewith, in exoneration of the land assigned to her in dower. Thus, it has been said, "if the husband's goods be not sufficient for payment of his debts, the heir must discharge dower of the burden, &c. for he is the widow's warrant of her dower and ought to follow for her county court, court leet and hundred, &c. that she may see to her house and nurture of her children." *Woman's Lawyer*, 289, cit. Bract. et vide postea, 993-4.

Husband's personal estate must discharge her dower.

(G) That the mortgage was for years, see the observations of Sir Joseph Jekyll on this case in *Banks v. Sutton*, 2 P. Wms. 716, and that the mort-

Text corrected.

clared his opinion to be, that she had, paying her portion of the mortgage money, and to hold over for the rest; and he distinguished this from Lady Radnor's case, because there was a satisfied term, and the husband had a power to bar her by assigning it over; but here it was only a mortgage, and against the heir.

[709]

Jointress may redeem and hold over till paid whole mortgage.

So (m), if there be a jointress of lands mortgaged, she, paying the mortgage, shall hold over, till she and her executor shall be repaid, with interest; for, as she is entitled to hold the lands discharged from incumbrances, she ought to be reimbursed the money she pays to set her estate free, and in the condition in which it ought to have been.

Though settlement be by articles merely, whereof mortgagee has no notice.

And the law is the same, although the settlement be upon articles only (n). Therefore, where the late husband of the plaintiff entered into articles with her, whereby it was agreed, that certain of his lands should be settled before the marriage (which was then intended between them) should be solemnized upon him and her, and the heirs of his body by her. He died before the settlement made in pursuance thereof, the lands being mortgaged to one who had no notice of the articles. After his decease, the plaintiff exhibited her bill to have them executed; and, although it was objected, that the articles being to make the settlement before marriage, the plaintiff's marrying before it was done, was a waiver of the benefit of them, and (the plaintiff being the sole party with whom they were made) a release in law; yet an execution of the articles was decreed against the heir at law of the husband, and also that the plaintiff should redeem and hold for her life, and her executors should detain the land, until the money, that she had lain out upon the redemption, was raised.

[710]

Mortgagee having notice of jointure, may tack money lent after marriage to mortgage made before marriage.

Where a mortgagee lends more money on his old security (n), without notice of a settlement intervening, he shall be allowed it; for, the legal estate being in him, he may protect himself thereby against a jointress, in like manner as he might against any other person, whose claim had no basis except what was

(m) *Bertue v. Stiles*, cited 1 Ch. Ca. 271. Et vide *Palmer v. Danby*, Pre. Ch. 137. et supra, p. 708. [See fur-

ther, postea, 993, 4, in notis.—Ed.]
(n) *Haymer v. Haymer*, 2 Vent. 343.

gage was made before marriage there can be little doubt, as supposing it made after marriage the wife would clearly be entitled to redeem, no fine or other assurance having been levied or executed, (at least none appears on the report,) to bar her of her dower.

(H) That is, on a mortgage made before marriage.

founded on an equity. Thus (o), where tenant in tail demised his lands for ninety-nine years, by way of mortgage, and afterwards married, and, in consideration thereof and of 500*l.* portion, suffered a recovery to enable him to settle a jointure, and then took up more money from the mortgagee upon the former security. The jointress was plaintiff, and the question was, whether the defendant should be allowed the money lent after the recovery and marriage? And the court declared that, if the defendant had no notice of the jointure when he lent the new money, he must be allowed it.

[711]

And a settlement of mortgaged premises, made after marriage, if *merely voluntary*, is void against a second mortgagee; although he hath notice thereof. Thus (p), where a man, who had mortgaged his estate, married, and, after marriage, made a settlement of the mortgaged estate upon his wife, which was recited to be in consideration of a portion paid, and then mortgaged it a second time; he dying, she brought her bill to be let into her jointure, on payment of one-third of the money due on the first mortgage, without being obliged to redeem the second mortgagee, whom she charged as having had notice of the jointure. It appeared that the second mortgagee had notice of the jointure, at the time of the mortgage; that there were no articles previous to the settlement; and no money was proved to be paid after marriage. And it was decreed, at the Rolls, that she should not be let into her jointure, without redeeming both; which decree was affirmed on appeal to the Chancellor.

Settlement after marriage not binding on subsequent mortgagee even with notice (1).

[712]

A wife, being a creditor by bond given before marriage, shall redeem her husband's estate mortgaged; and the estates being part copyhold will not alter the case. Thus (q), where the plaintiff's husband, before marriage, gave her a bond to leave her 1000*l.* if she survived him, and the same day married her, and some years after died intestate, leaving a freehold and copyhold estate, all in mortgage. The plaintiff took out administration, but the personal estate not being near sufficient to pay the bond, she brought her bill against the heir and mortgagee to redeem, and be let in to have satisfaction of her bond. The

Wife, creditor by bond before marriage, may redeem mortgage of freehold and copyhold land.

(o) *Goddard v. Complin*, 1 Ch. Ca. Ch. 65. [S. C. 1 Sid. 133.—Ed.]
119. (q) *Acton v. Acton*. Pre. Ch. 237.
(p) *Gardiner v. Painter*, Sel. Ca. S. C. 2 Vern. 480.

(1) The settlement being voluntary. The case of *Dolin v. Coltman*, ante, 704, seems to have been decided on the same principle. As to voluntary settlements, see ante, p. 655, of this edition, et seq.

[713]

Jointress of part may redeem whole mortgage,—must contribute,—and keep down interest.

defendant, the heir, urged, that by the marriage, the bond became void in law, and could not be maintained in equity, especially against him, who was chargeable only, in such case, by being particularly named; and that, although it should be supported as a marriage agreement in writing, yet it could only charge the personal estate, and could not affect the copyhold. *Sed per curiam*: if the bond were executed (which, being doubtful, was ordered to be tried, the court would support it as a bond, and the freehold and copyhold being mortgaged together, the plaintiff should redeem both (K).

A jointress of part of an estate mortgaged (r), is entitled to redeem the whole. But if a jointress after marriage, joins with her husband in a fine, and mortgages the land, and then the husband dies, there her land is charged, and she shall pay her part towards disencumbering of it. And, in that case, her executors shall not hold the land until satisfied thereout; because she herself concurred in the carrying on the charge, and therefore must join in disbursing of it according to the value of her interest, which is estimated at the rate of one third of the principal; and the jointress, unless she redeem, must keep down the interest (L).

Husband lends money in name of himself and

If a husband lends out money on mortgage in the name of himself and his wife, and then dies, the wife is entitled to the

(r) *Howard v. Harris*, 1 Vern. 33. 99. 1 Eq. Ca. Abr. 316, pl. 7. [2 Vent. 191. S. C. supra, 418, nom. *Howell* 465. 2 Ch. Rep. 147.—Ed.]
v. *Price*, Gilb. Eq. Ca. 106. 2 Ch. Ca.

Husband no power over wife's bond, if it be is not available during coverture.

(K) Holt, Ch. J. expressed himself to the following effect:—"When the wife has any right or duty which by possibility may happen to accrue during the marriage, the husband may by release discharge it; but where she has a right or duty which by no possibility can accrue to her during the coverture, there the husband cannot release it." Notwithstanding this, the Chief Justice is said to have differed in opinion with the other Judges, see antea, 263, of this edit. n. (E). As a general rule, a bond creditor, before he can redeem, must sue out a judgment at law. See antea, pages 261, 263, 281, and 348, of this edit. But the bond mentioned in the text being in the nature of a marriage agreement, did not, it seems, require this preliminary. The cases to be found in 1 Salk. 325. Com. 67. Carth. 511. Holt. 309. 12 Mod. 288. 1 Ld. Raym. 515. and Lill. Ent. 314, appear to be the same as the one cited in the text.

Test qualified.

(L) The present proportions of contribution are explained in a former page and note, see antea, p. 312, of this edit. n. (M). When it is said that the executors of the jointress shall not hold the lands till satisfied thereout, it must be understood as alluding to a complete satisfaction of the whole mortgage; for the debt being the husband's, the greater proportion of it ought to be liquidated out of his assets; and as to that proportion it is clear the executor of the jointress may hold over till satisfied, see antea, 681, of this edit., in the text, et seq.; and according to note (F) in that page, if the wife could prove that the whole was her husband's debt and that no part of it was applied to her use, she would, it seems, be entitled to be exonerated the entire mortgage out of her husband's assets, notwithstanding she concurred in operating her portion of the estate by means of the fine. Et vide further, as to the payment of interest, postea, 993-4, in notis.

survivorship, if there are assets sufficient to pay the debts without this money; for, in this case, the wife is in the nature of a joint purchaser. Thus, where G.'s personal estate was decreed to be applied to the payment of debts and legacies in ease of his real estate, which by his will was made liable thereto(s); and his widow and executrix, now the wife of the defendant B., upon the account before the Master, insisted, that several mortgages and bonds for money lent by her husband, being taken in the name of the husband and wife, she was entitled thereto as survivor, and that the same ought not to be brought into the account as part of the personal estate: the Master having stated that matter specially, it was insisted for the heirs, that the wife was but in nature of a trustee, the money being the husband's, which if paid in the life-time of the husband, would have fallen into his personal estate again, and he would not have been accountable to the wife; and that if this should not be liable to debts, the husband, by joining his wife in the security, might defraud all his creditors: but the court decreed in favour of the defendant, against the heir at law.

But in the case of creditors(t), the husband and wife being joined in the security, would not avail *her* against them(N).

wife, wife surviving entitled to whole (M).

[714]

Not against creditors.

(s) *Christ's Hospital v. Budgin*, (t) *Gatley v. Quarrel*, cited in the 2 Vern. 683. last case.

(M) This, on the principle of advancement, it being considered that when a husband effects a purchase in the name of his wife, he does it for the purpose of making a provision for her, which he is morally, legally, and equitably bound to do, according to Sir J. Jekyll, in *Banks v. Sutton*, 2 P. Wms. 703. Besides, a wife cannot be a trustee for her husband (except perhaps by express declaration), which rebuts the presumption of a resulting trust in the husband's favour. See *Kingdon v. Bridges*, 2 Vern. 67. The purchase however in this case is voluntary; and therefore its effect against creditors is noticed by the learned author in the next paragraph of the text. That a purchase by a husband in the name of his wife will not be considered as raising an implied trust for him, but that it will be taken as a beneficial purchase for the wife, see, in addition to the cases cited, *Back v. Andrews*, 2 Vern. 67. S. C. Prec. Ch. 1. postea, 736. *Smith v. Baker*, 1 Atk. 383. *Glaister v. Hower*, 8 Ves. 199. and *Rider v. Kidder*, 10 ibid. 367; and note, if a copyhold be purchased by the husband in the joint names of himself and his wife, they will both and each be tenants of the *entirety*, so that the husband cannot alien or devise the estate to the prejudice of the wife's right of survivorship. *Green v. King*, 2 W. Bl. 1211. *Back v. Andrews*, ubi supra; and *Purefoy v. Rogers*, 2 Lev. 39. As to what purchases shall be considered advancements to children and other relations, see *Rumbold v. Rumbold*, 2 Cox, 96, cited, S. C. 2 Eden, 15, and cases cited in Mr. Eden's n. (a), p. 17. *Rancliffe v. Parkyn*, 6 Dow. P. R. 200. *Morless v. Franklin*, 1 Swanst. 13. 2 Fonb. Trea. Eq. 121, 5th edit. 1 Watk. Co. 214. 2 Madd. Ch. 116, 2d edit., 2 Rob. Wills, 3. 127. 1 Scriv. Co. 463, 2d edit. and Sug. V. & P. Ch. xv.

Advancement.

(N) Because as to the wife the purchase in her name would be voluntary and fraudulent against creditors. On the same principle the decision in *Stileman v. Ashdown*, 2 Atk. 477. 481, seems to have proceeded. See also *Fletcher v. Sedley*, 2 Vern. 490, and Mr. Raithby's note (1), where the cases on this head are collected. But an advancement in favour of a child will

Contra; if before marriage, and as against what creditors.

Formerly held
that term barred
dower in
favour of heir,
devisee, and
purchaser.

[715]

It was held, in the case of *Brown v. Gibbs* (u), that a trust-term should not be removed out of the way of a dowress, even to let her claim in against an heir at law; and this determination was confirmed upon the first hearing of the case of *Wray v. Williams* (x) (o), wherein this point came again under consideration, upon a claim set up by a dowress against the devisee of her husband, who defended himself by a trust-term, created originally to defend a purchaser. The resolutions in both these cases were founded upon the determination in *Lady Radnor's* case (y), which was very different in its circumstances; that being the case of a purchaser, for valuable consideration of an estate, whereof there was a term for ninety-nine years standing out, created for the performance of several trusts, and afterwards to attend the inheritance; by assigning over of which, the husband had a power to bar his wife of dower; and which step he had taken to secure the purchaser.

Contra now as
to heir and de-
visee.

[716]

But the injustice of these decisions in favour of the heir at law and devisee (the latter of whom was a mere volunteer) against a dowress, whose title is particularly favoured in law (especially where the contrary was held respecting a jointress,

(u) Pre. Ch. 97. Mich. 1699. [S. C. 2 Freem. 233.—Ed.]

(x) Pre. Ch. 151. S. C. 1 P. Wms. 137. 28th June, 1700.

(y) Pre. Ch. 65. Mich. 1694. S. C. 1 Vern. 356. 2 Ch. Ca. 172, and in Eq. Ca. Abr. 219, by the name of *Bodmin v. Vandebendy*, S. C. Show.

Parl. Ca. 68. et vide *Hill v. Adams*, 2 Atk. 208; [and Butl. Co. Litt. 208 a. n. (1), where the judgment of Lord Hardwicke is fully given. This case of *Hill v. Adams* is also reported in Amb. 6, and 2 Freem. 211, sub nomine *Swannock v. Lyfford*.—Ed.]

be good against creditors, 1 Wask. Co. 224; and if the mortgage had been made in the name of the husband and intended wife before marriage, it would then have been available to her against creditors, Gilb. U. p. 47; and it seems that the husband must be proved to have been indebted, at the time of the settlement, to the extent of insolvency, in order to invalidate the settlement. *Christ's Hospital v. Budgen*, 2 Vern. 683. It has, however, been strenuously argued, that a purchase is not within the operation of the act of 13 Eliz.; for as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him, see Ath. on Sett. Chap. V.; and this, says Mr. Sugden (V. & P. 542, 5th edit.) seems to be the better opinion, where the case is clear of actual fraud, citing *Fletcher v. Sidley*, ubi supra. *Proctor v. Warren*, Sel. Ca. Ch. 78. and 8 Ves. 199. With respect to purchases made in the name of a wife or child, by persons who afterwards become bankrupts, it is necessary not only that they should not be indebted, but also that they should not be in trade at the time of making the purchase. See *Glaister v. Hewer*, 8 Ves. 195. S. C. 9 ibid. 12. 11 ibid. 377.

Wray v. Williams
reversed.

(O) This case was first heard before Lord Keeper Wright, who declared that Lady Williams was not entitled to dower of the lands in question, there being a trust term subsisting in them prior to the marriage. Pre. Ch. 151. On a bill of review ten years afterwards, Lord Harcourt reversed Lord Keeper Wright's decree, and ordered that the plaintiff (Lady Williams), having recovered dower at law, this trust-term that Sir B. Wray the heir had set up, should not stand in her way in equity. 1 P. Wms. 139.

who was considered as a purchaser) could not long escape the observation of the court; more especially, as they were made expressly upon the authority of a case, the circumstances of which were totally different. Accordingly, this doctrine was revised, and the contrary determined in a series of decisions.

Thus, in the case of *Hitchin v. Hitchin* (x), where H., the plaintiff's grandfather, made a mortgage for 500 years (which was satisfied, and after his death, assigned to S. his relict, who was entitled to dower of his estate) and then died, leaving the plaintiff's father his son and heir; who being indebted, made his will, and thereby devised lands to his wife L., but did not mention the devise to be in satisfaction of her dower, and devised the residue of his estates unto his executors until his debts paid. L. brought her writ of dower and recovered; then the heir brought his bill to be relieved against the recovery, and she brought her bill for a discovery and to set the term out of the way; and it was decreed, that the dowress should be relieved against a satisfied mortgage term.

Dowress relieved against satisfied mortgage term, as between herself and heir.

[717]

The case (a) of a satisfied or unsatisfied mortgage term, seems to differ only in this; that in the one, the court gives the dowress relief absolutely, in the other, upon terms of keeping down a third of the interest, or paying a third of the principal: but as to the mortgagee, the dowress must pay the whole money, and hold over for the residue.

Satisfied and unsatisfied term distinguished as to dower.

This latter resolution, as to trust terms, was farther settled, upon a bill of review brought upon the case of *Williams v. Wray* (b), in which Lord Keeper Wright's decree was reversed; and also in the case of *Higford v. Higford*; both of which resolutions were made by Lord Keeper Harcourt, and firmly established the law, that *a dowress having recovered at law, a trust term set up should not stand in her way in equity.*

Dowress recovering at law, term removed in equity.

[718]

So in the case of *Dudley v. Dudley* (c), it was held, that a trust term, attending upon the inheritance, should be removed in favour of a dowress against an heir at law (P).

As against heir.

(x) Pre. Ch. 133. Mich. 1700. 3 C. 2 Vern. 403. [S. C. 2 Freem. 241, and 1 Eq. Ca. Abr. 218, pl. 18. which seems to be the same case, but differently stated.—Ed.]

(a) *Banks v. Sutton*, 2 P. Wms. 700.

(b) *Williams v. Wray*, 1 P. Wms.

137. Hill. 1710. *Higford v. Higford*, 1 Eq. Ca. Abr. 219, pl. 5. Easter, 1710: See vide 2 P. Wms. 707, where this case is said to have been determined in Easter Term, 1711.

(c) Pre. Ch. 241. S. C. 1 Eq. Ca. Abr. 219, pl. 5. Easter, 1711.

(P) As against an heir at law, devisee, or volunteer, an attendant term will be removed out of the way of the dowress, that is, she will be entitled to dower as against those persons, notwithstanding the term. *Mitchell v. Rey-*

Term removed in favor of dowress, when.

No dower of equity of redemption on mortgage in fee.

But a wife is not entitled to dower(*d*), out of the equity of redemption of a mortgage in fee.

(*d*) 1 Atk. 606. 3 P. Wms. 234, 5. [et vide postea, 731.—Ed.]

At law, term virtually deprives widow of dower.

nolds, Butl. Co. Litt. 208 a. latter end of note there. But as against a purchaser for valuable consideration, who has obtained an actual assignment of the term to his own trustee, the widow will have no effectual remedy, and she must lose her dower. *Ibid.* et vide antea, 483, of this edition is *notis*, where this subject is considerably enlarged on. The principles on which this protective doctrine of attendant terms is founded may be thus shortly explained:—

By the rules of the common law it is customary, in giving judgment on a writ of dower, to except the interest of the termor, if it appears to the court that the term was created prior to the title of dower. This is effected either by giving judgment *specially*, that the demandant shall recover seisin of the reversion, upon which a writ of *hab. fac. scilicet* is awarded to the sheriff, with a proviso *quod ten. ad termin. annor. non expellatur*; or by giving judgment *generally*, with a *cesset executio* during the term. *Bodmyn v. Child*, Com. Rep. 185. *Wheatley v. Best*, Noy, 65. *S. C. Cro. Jac.* 564. The former mode is adopted where there is any rent reserved upon the lease for years, in order to enable the dowress, as the reversioner, to obtain the benefit of the rent; and although the rent reserved be but a pepper corn, it seems that the dowress will be entitled to an immediate execution. See *Pheasant v. Pheasant*, 3 Ch. Rep. 69. *Tiffin v. Tiffin*, 2 Freem. 66. *Anon.* Owen, 32, pl. 2. *Portington v. Beaumont*, Winch, 79. *Foljambé's case*, Godb. 165. 1 Roll. 678, and *Stoughton v. Leigh*, 1 Taunt. 402. If, however, there be no rent payable in respect of the term, as if lands are limited or devised to one for years, with remainder to another in fee, or on a common demise with no clause of reservation, execution will be stayed during the continuance of the term, as no benefit could arise to the dowress from her obtaining seisin. *Perk. s.* 335, and see *Brown v. Gibbs*, Pro. Ch. 97. 2 Freem. 233. Godb. 165. Judgment then being given merely of the reversion and rent, with an immediate execution, if there be any rent reserved on the term; or of the reversion alone with a *cesset executio* during the term, if there be no rent reserved thereon, it is apparent that the widow to all purposes of benefit will at law be deprived of her dower.

Contra in equity against heir, devisee, and volunteer.

A court of equity, however, regards the purpose for which the term was created, and views the extent to which the owner of the reversion is interested therein. It declares, that when the trust or purpose of the term is satisfied, the ownership of the term shall belong in equity to the owner of the freehold and inheritance, whether it be declared by the original conveyance to attend the inheritance or not; that the trustee shall hold the term for the benefit of the proprietor of the fee; and that the term shall be considered as part of the inheritance, yet not merged, but so attendant upon the fee as to follow and accompany it, and every right and interest growing out of it, either by *operation of law*, or by the agreement of the parties. In a late case the Master of the Rolls said, "Every description of ownership shall, in its order, degree, and proportion, have a use in the term commensurate with the interest existing in the inheritance." *Maunderell v. Maunderell*, 7 Ves. 578. When therefore dower arises, the term in a proportion is just as much attendant on that interest growing out of the inheritance, as before it was attendant on the inheritance during the husband's life; consequently the heir, devisee, or volunteer, although he can avail himself of the term at law, yet he will not be permitted in equity to defeat by it the widow's claim to dower; for she having a certain quantity of interest in the inheritance as well as such heir, devisee, or volunteer, a court of equity will consider her to have a correspondent interest in the term. Hence then arises the widow's equity against her husband's heir, devisee, and volunteer.

As also against assignee in bankruptcy.

In *Squire v. Compton*, 9 Vin. Abr. 227, pl. 60. *S. C.* 2 Eq. Ca. Abr. 387, pl. 7, it was made a question whether the assignees, under a commission of bankrupt could, by taking an assignment of a mortgage term prior to the title of dower protect their estate from the wife's claim? It was insisted, that creditors and assignees of commissioners of bankrupt stood only in the place of the bankrupt, and since such an assignment to the bankrupt himself or his heir would not protect the estate from a title of dower in the

This distinction (e) between a mortgage in fee and a mortgage for a term of years, appears to have taken its rise from

(e) Vide *Godwin v. Wisnmore*, 2 Atk. 526.

hands of the heir, neither would it protect the estate in the hands of the creditors of the bankrupt, or in the hands of the assignee of the commissioners; and that this varied the present case from the case of *Lady Radnor v. Vandebendy*, in Dom. Proc. where it was held, that such a prior term should protect the estate from dower in the hands of a purchaser. The decree was, that the widow should be let into her dower,—keeping down the interest of a third part of the mortgage, [that is, a third part of the interest of the whole mortgage, see *infra*, p. 994.]

The same principle that extends to deprive the husband's heir, devisee, volunteer, and assignee of bankrupt of the benefit of the term, applies equally against a purchaser who stands precisely in the husband's place. The term accompanies the freehold and inheritance in the mode and manner in which it was attendant upon the same before the inheritance was conveyed. If, therefore, a purchaser merely take a conveyance of the freehold and inheritance, the vendor's widow will be entitled to dower notwithstanding the term; for that was her equity as against her husband, and the conveyance of the reversion merely, cannot alter that equity in favor of a purchaser. If, however, the purchaser procure an actual assignment of the term to a trustee of his own nomination, it has been settled, that such assignment will protect him against the title of the widow, although he have notice of the dower previously to his purchase. See *Maundrell v. Maundrell*, 10 Ves. 272. 5 C. 7 Ves. 567. And it is observable that a mortgagee is a purchaser within the scope of this rule. If, therefore, he procure the assignment of an outstanding satisfied term, it will protect his security from the dower of the mortgagor's widow. *Wynn v. Williams*, 5 Ves. 130. Indeed, for all purposes of security to a mortgagee, the term is in practice usually relied on as a sufficient protection against the dower, though as to a purchaser it has been already noticed that a fine is in many instances required. See *antea*, 483, 484, of this edit. in *notis*. The uniform opinion of the profession is, that the term must be *actually assigned* to a trustee for the purchaser, if it be intended to be used as a bar to the wife's dower. See *Sug. V. & P.* 378, 5th edit. And Lord Eldon has said, that such assignment must be “in the very transaction” of the purchase or mortgage, which seems to imply that it will be unavailable, if taken after the purchase or mortgage has been completed. See *antea*, p. 483, of this edit. in *notis*. Mr. Belt deduces this conclusion from *Maundrell v. Maundrell*, *ubi supra*, as a settled principle, namely, “that a purchaser, to avail himself of an outstanding term, must have procured an assignment of it, or a declaration of trust, or have obtained possession of the deed which created it.” 1 Bro. C. C. 326, n. (1), Belt's edit. So much of this passage as is in italics must, as a general rule, be denied to be law.

The term we have been speaking of is a satisfied term, and it should be remembered that the preceding observations are applicable to a satisfied term only, but the period when the term becomes satisfied and attendant, whether before or after marriage is immaterial,—that it be created before marriage is all that is requisite. If the term be created after marriage, the mortgage will be subject to the dower and not the dower to the mortgage, unless indeed the wife shall have debarred herself of dower by joining in a fine or recovery, and then only to the extent of the charge or incumbrance created by such assurance, as stated in a preceding note, see *antea*, p. 707, note (D). If a mortgage for years executed before marriage, be still subsisting at the husband's death, then in the event of a pepper-corn rent having been reserved on the term, the widow, we have seen, will have judgment for a third part of the reversion and a third part of this rent as incident thereto, which being an immediate interest in the premises though a minute and barely appreciable one, will entitle her to redeem the whole mortgage, and to proceed against the heir or reversioner for contribution. If the termor be not in possession, she will be entitled to enter on the premises and receive the rents and profits subject to the charge. She will likewise be entitled to have the land exonerated out of

But not against mortgagee and purchaser, when.

If term not satisfied, widow can obtain dower by redeeming.

the equity of redemption of the former having been considered as analogous to a pure trust ; of which it was formerly, and is

the husband's personal estate, as mentioned in a former note, see *antea*, 681, of this edition, n. (F). If the term have no rent reserved upon it, as is frequently, indeed generally the case in wills and marriage settlements, (where the term is raised for the purpose of portioning or otherwise), it should seem to follow from the preceding observations, that since no rent is reserved, judgment can be given of a third part of the reversion only, with a stay of execution during the term, and consequently that the wife having no present interest in the term cannot redeem. But we have seen that a remainder-man or reversioner may redeem, *antea*, 312, of this edit. n. (L), to which add *Aynsly v. Read*, Dick. 249; and it is observable, that in *Dudley v. Dudley*, ubi supra in the text, where the wife of a tenant in tail recovered dower at law with a *cassat executio* during the term, it was decreed in equity, that the dowress should have the benefit of the trusts of the term, as to a third part of the profits above the charge of the annuities, and that the trustees should account to her for the third part accordingly from the death of her husband, and from time to time for the future rents and profits during the term, and that the term should stand charged therewith during her life. Indeed a distinction never appears to have been drawn as to equitable relief, between the case of a dowress who has had execution of her judgment at law, and so become to all intents and purposes tenant for life of the reversion, and entitled to be let into possession as against the trustee of the term, and the case of a dowress who has recovered judgment with a stay of execution, and who consequently cannot entitle herself even to the ownership of the reversion ; although it might certainly have been open to contend that the cases afforded a distinction, since in the former instance the dowress merely comes into equity to have the trust executed for her benefit, as the complete owner *pro tempore* of the reversion, by virtue of her recovery at law ; while in the latter case, she comes to have a title made good in equity, which is not available at law during the existence of the term, or, as it hath been expressed, to be relieved against that very judgment upon which she founds her title. See Park on Dow. 365.

Whether covenant against incumbrances sufficient indemnity against damages and costs in writ of dower.

The tenant cannot plead a prior term of years in bar to an action on a writ of dower, for it is in fact no bar, but he may plead it in delay of execution and to save himself the damages, if no rent be reserved on the term ; or if such rent be reserved, he may pray that the demandant be endowed of the reversion and the rent. See *Booth v. Lindsey*, 3 Ld. Raym. 1294. *Anonymous*, 2 Mod. 18. *Villers v. Hanley*, 2 Serjt. Wils. 49. If damages are obtained upon a verdict in such an action, the statute of Gloucester (6 Edw. 1, c. 1, sec. 2), gives the demandant costs ; but if no damages are given, the demandant, although she obtain judgment for her dower, must pay her own costs. Lord Hardwicke has said, that the covenant against incumbrances generally introduced in mortgage and purchase deeds, will indemnify the purchaser or mortgagee against such damages and costs. *Swannock v. Lufford*, Butl. Co. Litt. 208 a. n. (1). But, as remarked in a preceding page. (see *antea*, 483. of this ed. in *notis*), a purchaser may fairly require an adequate indemnity against the costs of any suit instituted by the widow to recover dower, and it will be for him to consider whether the vendor's own covenant against incumbrances generally, will afford that ample security which is required. Lord Eldon, in *Innes v. Jackson*, 16 Ves. 366, thus expresses himself of a covenant for further assurance. "The covenant for further assurance, does in terms amount to an agreement to levy a fine, just as if it had been so expressed ; and if the mortgagee's title would not have been good without a fine, I apprehend an action might have been maintained by him upon that covenant ; or, upon the principle of a certain class of cases, [see *postea*, 739.] perhaps this court would have decreed the husband to procure his wife to join in levying a fine."

Repertorium of cases.

The cases on the subject of this note are numerous. The following are the principal, in addition to those mentioned in the text : *Snell v. Clay*, 2 Vern. 324. *Hamilton v. Mohun*, 1 P. Wms. 118. *Squire v. Compton*, 9 Vin. Abr. 227, pl. 6. S. C. 2 Eq. Ca. Abr. 387, pl. 7. *Dormer v. Fortescue*, 3 Atk. 131. *Mitchell v. Reynolds*, Butl. Co. Litt. 208 a. latter end of n. (1). S. C. 1 Atk. 604. *Wynn v. Williams*, 5 Ves. 130. *Maunderell v. Maunderell*, 7 Ves. 567.

now generally understood, dower cannot be ; as well because, in such case, there is no seisin by the husband, which, at law, is necessary to consummate the title of dower in the wife, as that, by the preamble to the statute of uses, it was recited, that, by means of uses, the wife was defeated of her dower, from whence it appeared, that the wife of *cestui que use* was not dowerable at common law ; and if so, then the conclusion necessarily followed, that as an use at common law was the same as a trust since the statute, the wife could no more be endowed of a trust since the statute, than at common law, and before the statute, she could of an use. And as the analogy to uses had great weight, originally, in establishing this rule as to trust estates, so the common practice of conveyancers, founded thereupon, in placing the legal estate in trustees on purpose to prevent dower (which made the letting in that claim upon trusts, contrary to former opinions, of dangerous consequence to old titles) rendered the courts of law very jealous of breaking in upon this rule ; it having been thought safer to abide strictly by the rule of law, *even* in cases where the reason of it did not apply, *than* to shake the foundation of ancient titles, by permitting nice and curious exceptions to be made to the general rule.

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Therefore, although this rule of law, as to a dowress claiming dower out of the equity of redemption of a mortgage in fee, was attempted to be broke through in the case of *Banks v. Sutton* (f) (in which case, this doctrine was gone into by Sir Joseph Jekyll, Master of the Rolls, in a learned and elaborate argument, and it was resolved, that a woman was entitled to dower out of the equity of redemption of a mortgage in fee) yet in a later case, in which this question came before the Lords Commissioners of the great seal, that decision of Sir Jo-

Banks v. Sutton, (wherein the contrary was held) overruled. (See also *postea*, 731.)

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(f) 2 P. Wms. 700. Vide 3 *ibid.* 232, n. (B).

S. C. affirmed on appeal, 10 Ves. 246. *Simpson v. Gutteridge*, 1 Madd. Rep. 618. And see further *antea*, 483, of this edition, n. (A), sec. iii. 3. *Altham v. Anglesey*, Gilb. Eq. Ca. 16. S. C. 1 Stra. 12. Doug. 25, and *Lampet's case*, 10 Co. 49 b.

As a corollary it may be remarked, that from the preceding observations it should seem to follow, that in every case of a mortgage for years, whether before or after marriage or whether the mortgage be satisfied or not, the widow by a circuitry will become entitled to a beneficial estate in dower, except in the instance of a purchaser procuring an actual assignment of a satisfied term, created previously to the marriage to attend the inheritance; and the case of a purchaser buying subject to a mortgage for years, and paying off the money during the life of the vendor, and taking an assignment of the term to a trustee of his own nomination to attend the inheritance, must, it is conceived, be considered as included within the spirit and meaning of this exception.

Corollary:—
widow in every case entitled to dower of equity of redemption on mortgage for years.

seph Jekyll was over-ruled, and the resolution in the case of *Banks v. Sutton*, as to this point, taken as a general position, held not to be law (Q).

Dower a moral, legal, and equitable right.

(Q) It may not, however, be amiss just to advert to the leading features of his Honour's judgment in that case, notwithstanding it has been over-ruled. "All kinds of dower," observed Sir Joseph Jekyll, "were instituted for the subsistence of the wife during her life; which right of dower is not only a legal but a moral right. The relation of husband and wife as it is the nearest, so is it the earliest, and therefore the wife is the proper object of the care and kindness of the husband; the husband is bound by the law of God and man to provide for her during his life, and after his death, the moral obligation is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own; if before her marriage she had a real estate, this by the coverture ceases to be her's, and the right thereto, whilst she is married, vests in the husband; her personal estate becomes his absolutely, or at least is subject to his controul; so that unless she has a real estate of her own (which is the case but of few), she may by his death be destitute of the necessities of life, unless provided for out of his estate, either by a jointure or dower. As to the husband's personal estate, unless restrained by special custom (which very rarely takes place), he may give it all away from her; so that his real estate (if he had any), is the only plank she can lay hold of, to prevent her sinking under distress. Thus is the wife said to have a moral right to dower. Dower also is a legal right created by law; which settles the quality of the estate out of which the wife's dower arises, and likewise ascertains the quantum thereof. Dower is also an equitable right, and such a one as is a foundation for relief in a court of equity; it arises from a contract made upon a valuable consideration; marriage being in its nature a civil, and in its celebration, a sacred contract; and the obligation is a consideration moving from each of the contracting parties to the other; from this obligation arises an equity to the wife, in several cases, without any previous agreement; as to make good a defective execution of a power, a defective conveyance, or supply the defect of a surrender of a copyhold estate; in all which the court relieves the wife, and makes a provision for her, where it is not unreasonable or injurious with respect to others." Sir Joseph Jekyll then went into an elaborate review of the cases which bore directly or indirectly on the point before him, and concluded by declaring, that he did not know, nor could find any instance, where dower of an equity of redemption was controverted and adjudged against the dowress, and as there were authorities in cases less favourable, therefore he declared, that the plaintiff being the widow of the person entitled to the equity of redemption of the mortgage in question (being a mortgage in fee), she had a right to redeem. See 2 P. Wms. 718, 719.

Marriage a good consideration.

Distinction in dower between trust created by husband, and trust created by his ancestor, disregarded.

In the above case, Sir Joseph Jekyll seemed strongly inclined to take a distinction between a trust created by the husband himself, of which he admitted a woman was not endowable, and a trust created by another person. "That the wife shall not have dower of a trust created by the husband," he remarked, "or (which is all one), of a purchase made by him in a trustee's name, may be reasonable, since it may be presumed to be done with intent to bar dower, and every man may do as he pleases with his own. Accordingly, it has been commonly practised for a purchaser to take a conveyance in his own name and in the name of another person, as trustee, purposely to prevent dower." But, "I would not take it upon myself to determine, whether a wife shall have dower out of a trust of the inheritance, where it is created, not by the husband, but by some other person, and no time limited for conveying the legal estate; when that comes to be the case, it will be time enough to determine it." See 2 P. Wms. 709, 715. Lord Talbot decided the case of *Attorney-General v. Scott*, Ca. Temp. Talb. 138. (S. C. Sng. V. & P. App. No. xvii. p. 33. 5th ed.), without any regard to this distinction, and Lord Hardwicke in *Goodwin v. Winsmore*, 2 Atk. 525, said, a distinction was taken by Sir Joseph Jekyll in *Banks v. Sutton*, 2 P. Wms. 707, 709, in regard to a trust, where it descends or comes to the husband from another, and is not created by himself; but Lord Hardwicke thought

The case I allude to, was that of *Dixon* widow of *Abraham Dixon v. Sir George Saville* and others (g), which came on to *Dixon v. Saville stated.*

(g) *Dixon v. Saville*, 7th November, 1783. [S. C. shortly stated 1 Bro. C. C. 325.—Ed.]

there was no ground for such a distinction, for it was going on suppositions which held on both sides; and, at the latter end of the report, Sir Joseph Jekyll seemed to be very diffident of it himself and rested chiefly on another point of equity, so that it was no authority in point. But his Lordship added, "there is a late authority in direct contradiction to the distinction above taken in *Banks v. Sutton*, [namely,] the case of the *Attorney-General v. Scott*," (ubi supra).—So also in *Burgess v. Wheate*, Sir Thomas Clarke remarked, that the distinction made by Sir Joseph Jekyll was founded on too precarious a reasoning to go upon. The husband, he observed, found the estate subject to the trust created by the ancestor: who could say that he intended the wife to be dowable? Who could say, that if he had not found the estate under a trust, he might not have created such a trust. 1 Wm. Bl. 138, and see *ibid.* 161. S. C. 1 Eden Rep. 224. On the authority of these observations, we may venture to affirm, that the distinction alluded to by Sir Joseph Jekyll is without foundation.

His Honour also adverted to the distinction which has inexplicably crept in respecting dower and curtesy of an equity of redemption—the former being denied, and the latter allowed. He said he could not but wonder how it ever came to be thought, that a tenant by the curtesy was entitled to relief in equity more, or farther, than a dowress, and particularly, that a tenancy by the curtesy might be of a trust estate, but not dower; which was no less than a direct opposition to the rule and reason of the law allowing dower of a seisin in law, but not a tenancy by the curtesy, because the wife could not gain an actual seisin, but the husband might; which reason held in a trust-estate, for the wife could not gain or compel a trustee to convey the legal estate to the husband, but the husband himself might; therefore, if any distinction was to be made, dower (it seemed to his Honour) ought to have been preferred to curtesy. 2 P. Wms. 705. Lord Redesdale, in a late case, has well stated the only ground on which this anomalous distinction can be reconciled. The difficulty, he observes, in which the courts of equity have been involved, with respect to dower, originally arose thus:—They had assumed, as a principle in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights had attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea: and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule, with respect to trusts in cases of dower. But the same objection did not apply to a tenancy by the curtesy; for no person would purchase an estate subject to curtesy, without the concurrence of the person in whom that right was veated. This, Lord Redesdale took to be the true reason of the distinction between dower and curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estate, to depart from the general principle in the case of dower; but it was not necessary in the case of a tenancy by the curtesy. *Darcy v. Blake*, 2 Sch. & Lef. 388.

It has always been considered that the decision against the dowress proceeded on a wrong principle. Even the Judges themselves, who pronounced the decree, thought it would not admit of much discussion. Mr. Park, on this subject, very elegantly remarks:—"Upon an attentive perusal of the cases, it will be found, that after much hesitation, whether to prefer consistency of principle, or security of titles; the latter motive at length gained the ascendancy, the existence of an anomalous distinction being regarded as of less importance than the extensive mischief which

Origin of distinction as to denying dower, and allowing curtesy of a trust.

Sacrifice of principle, was in allowing curtesy, not in denying dower.

Widow not endowable of a pure trust.

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Under the first of these heads, it was observed, that dower was a right of the first attention and most sacred preservation at the common law, it was a right not only founded in our law, but a right consonant to the first principles or laws of morality and equity, as springing from the moral obligation a man was under to make a provision for his wife. And we accordingly found it, in a variety of cases, aided and extended beyond its strict *legal limits*, by the interposition of our courts of equity, in removing trust terms, and other obstructions to it in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to our common law, but a right recognized, protected, and aided *in equity*; and which, so far as it was the subject of relief in equity, must be considered as an equitable right⁽ⁱ⁾. This was the predicament in which it stood in the case of *Dudley v. Dudley, Higford v. Higford, Wray v. Williams*, and the other cases, wherein it had been decided that a dowress should have the benefit of a trust term attendant on the inheritance, as against the heir. Considering it therefore as an *equitable right*, it well might be a wonder how it came about, that a widow should not be entitled against the heir to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so, to the cases where the trust was created by the husband himself^(k); this was the opinion of the Master of the Rolls in *Banks v. Sutton*; however, this opinion had been over-ruled, and it seemed to be a settled point, that a widow was not dowable of a direct proper trust.

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Equity of redemption, and mere trust, distinguished.

This naturally lead to the second head of argument in favour of the widow; namely, the distinction between a *mere trust*, that was an use, as it was styled at common law, and an *equity of redemption*; the former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It, of course, did not involve in it that right; if it had, there would have been two opposite rights of dower in the same lands at the same time; as the widow of both the *trustee* and of the *cestui que use* would have been entitled to dower. For the widow of the trustee was clearly entitled at common law; and when the Court of Chancery interposed to prevent the *legal* title of the widow of the trustee, it seemed extraordinary that it did not, in its place, substitute an *equitable* one of the widow of the *cestui que trust*. But, how-

(i) *Supra*, [250, 251, of this edition.—*Ed.*]

(k) *Supra*, 720.

ever, these sorts of trusts being the *creatures* for the parties themselves, whatever were the legal incidents or privileges they wanted, might have been supposed to have been *voluntarily* relinquished and abandoned by the parties creating those trusts. But it was otherwise in regard to an "*equity of redemption*," that was not any interest created or reserved, by or between the parties, beyond the express time of redemption; it was a mere creature of a court of equity itself, founded on this principle, that as a mortgage was originally nothing more than a pledge or security to the mortgagee for his money, it was but natural justice between man and man, to consider the original ownership of the lands as still residing in the mortgagor, subject only to the *legal title* of the mortgagee, so far as such legal title was requisite to the end of his security; and accordingly, the title of the mortgagee was not treated by equity, as any title beyond that point. His *beneficial* interest, though the mortgage was in fee, was considered only as personal estate; he was not permitted to grant leases or exercise any other act of ownership, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his estate. His widow was not permitted to claim dower, nor could he or those claiming under him avail themselves of several other privileges and incidents attending real property. It seemed to be the regular consequence of the doctrine adopted by our courts of equity, in regard to mortgages, by considering them strictly and merely in the nature of *securities* for the mortgage money, and entitling the mortgagee to no other of the incidents or privileges of ownership in the lands than what was requisite for the end of such security; that all such privileges and incidents of ownership of the lands, as were not considered as becoming vested in the mortgagee for the purpose of his security, and the exercise and enjoyment whereof could not be prejudicial to, or inconsistent with that security, should be held to remain in the mortgagor, or in other words, that he should, to all purposes not prejudicial to the mortgagee, be considered as the complete owner of the mortgaged lands. And accordingly this was found to be the established doctrine in several instances, when only *volunteers* were interested, such as revocations under powers, and revocations of devises, as in the cases of *Thorn v. Thorn*, and *Hall v. Dunch* (1), and other like cases. That in the case of *Lincoln v. Rolle* (11), the doctrine was expressly recognized

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(1) [Supra, 110, of this edition.—
Ed.]

(11) [Show. Par. Ca. 156, et supra,
110, of this edition, n. (c).—Ed.]

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Saville.*

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and admitted on both sides; because in equity a mortgage did not make the estate another's, and because a mortgage was *not an inheritance* but a *personal estate*, and there seemed no reason in the world why these general incidents of complete ownership should be saved in favour of a devisee or other volunteer, and not in favour of a wife, whose claim of dower stood upon the strongest grounds of moral and equitable right, and who was, in many instances, considered as entitled to relief in equity, in regard to an intended provision, when a devisee or other mere volunteer was not. And, agreeably to this doctrine, was the decision in the case of *Banks v. Sutton*, where it was decreed in favour of the claim of dower, out of an equity of redemption of a mortgage in fee; which decision was founded on a variety of authorities, and reasons delivered by the Master of the Rolls, all which were equally forcible in the present case. That the case of *Banks v. Sutton* was directly in point of the present question; for though the Master of the Rolls would not take upon himself to determine the question, in regard to the dower out of a *mere trust*, created not by the husband, but by some other person, with no time limited for conveying the legal estate; and avoided this point, by shifting his grounds to that of the husband's being entitled, under the express direction of the will under which he claimed, to have the estate conveyed to him at the age of twenty-one; which circumstance, under the application of a common principle of equity, of *considering that as done which ought to have been done*, of course in equity, let the widow in to the same degree of title as she would have had if the trustees had conveyed the estate to her husband at the time directed; yet as there was a mortgage in fee prior to the devise, the other point of the right of dower, *out of such equity of redemption*, still subsisted independent of the constructive or assumed conveyance by the trustees at the time directed. And as the principle on which the Master of the Rolls got rid of the first point did not apply to this, he accordingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning, and through them to come to a professed decision of the point, as he expressly did when he said, "he did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress;" and as there were authorities in cases less favourable, he therefore declared, that the widow of the person en-

titled to the equity of redemption of the mortgage in question, which was a mortgage in fee, had a right of redemption; and decreed her the arrears of her dower from the death of her husband, she allowing the third of the interest of the mortgage money unsatisfied at that time: that an authority more directly in point than this was could not be expected. And though the subsequent case of the *Attorney-General v. Scott (m)*, (before Lord Talbot) in which the widow was denied dower, was generally considered as an authority contrary to, and superseding that of *Banks v. Sutton*; yet such a conclusion seemed too hasty, as the two cases appeared to differ materially; for in that of the *Attorney-General v. Scott*, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees, in whom it was vested antecedent to such mortgage, and consequently the decision in that case was on a direct proper trust, and not on mere equity of redemption. And the difference between a *direct trust* and an *equity of redemption*, and between the claim of a widow and that of a devisee or mere volunteer, was strongly insisted upon; and the distinction between this case and that of a claim of dower against a purchaser fully enforced.

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But the Lords Commissioners said (n), that the case of an estate by the curtesy in a trust was the anomalous case, not the rule, that the wife should not have dower: and that this point was so much settled, that it would be wrong to discuss it much; and the bill was dismissed, but without costs, the defendants not praying them (R).

Decree.
Widow not endowable of equity of redemption on mortgage in fee made before marriage.

(m) *Attorney-General v. Scott*, Ca. temp. Talb. 138.

(n) Vide Gilb. *Lex pratoria*, 266, 267.

(R) This case is shortly stated in 1 Bro. C. C. 325, without variation in any material point. The case of *Banks v. Sutton*, though not expressly over-ruled by the case in the text, has since been denied to be law by abundant authority. Thus, in *Chaplin v. Chaplin*, Lord Talbot said, that it had been the common practice of conveyancers, agreeably to the rule of law before the statute, to place the legal estate in trustees to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates; 3 P. Wms. 234. Lord Alvanley, in *Curtis v. Curtis*, 2 Bro. C. C. 630. (S. C. 2 Ves. jun. 124, cited,) observed:—"It is now too late to contend that the widow can have her dower out of any estate in which her husband had not the legal fee; for *Banks v. Sutton*, (2 P. Wms. 700) is not now to be supported; not that there appears to have been any decision directly contradicting it; for *Attorney-General v. Scott*, Ca. temp. Talb. 138, did not mean to find fault with *Banks v. Sutton*. However, it is now a settled point. Dower, therefore is a mere legal demand, and the widow's remedy is *prima facie* at law." The doctrine as settled by *Dixon v. Saville*, was again distinctly acknowledged by Lord Thurlow in *Williams v.*

Dower a legal demand.

Banks v. Sutton, and Dixon v. Saville distinguished.

However, it is necessary here to remark, that there were some circumstances which distinguish the case of *Banks v. Sutton* from this of *Dixon v. Saville*; particularly that, in the former case, the mortgage was made by the ancestor of the

Lambe, 3 Bro. C. C. 263, who said, that if it turned out that the mortgage (being in fee) was made before marriage, there would be an end to the widow's claim of dower.

Reasons for not allowing dower of equity of redemption.

Lord Redesdale's observations on this head are too important to be omitted. In *Darcy v. Blake*, 2 Sch. & Lef. 388, his Lordship observed:—"The general principles upon which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right, where it does not subsist at law: therefore there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower, subject to the term. The principles on which this doctrine was originally settled, were these:—Pending the coverture, a woman could not alien without her husband; and therefore nothing she could do could be understood by a purchaser to affect his interest: but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach: and the general opinion having long been, that dower was a mere legal right, and that as the existence of a trust estate previously created, prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity, and many titles depending on this opinion, it was found that it would be mischievous in this instance that equity should follow the law: and it has been so long and so clearly settled, that a woman should not have dower in equity, who is not entitled at law, that it would be shaking every thing to attempt to disturb the rule. In point of remedy, a woman claiming dower may be assisted in equity. A court of equity will put out of her way a term which prevents her obtaining possession at law; *Radnor v. Vandebendy*. Pre. Ch. 65, *S. C.* Show. Par. Ca. 96, but that is only as against an heir or volunteer not as against a purchaser, the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any questions of dower have arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favour; by giving her discovery of deeds; by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. What was thrown out by Sir Joseph Jekyll in *Banks v. Sutton*, has been over-ruled. See Cox's note (1) 2 P. Wms. 719. The rule of courts of equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes perhaps, beyond the reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous—so generally adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at this time, to alter them. Nor do I think that the doubts which have been suggested with respect to an equitable estate, can be fairly raised in this case; where the claim is of dower of estates leased for lives before the marriage, and continuing subject to such leases at the death of the husband. Of those parts of his estate, the late husband of the defendant, Margaret Blake, was not so seised as to entitle her to dower at law; and if equity were strictly to follow the law, she could have no claim in equity for dower of those estates. The husband had not such a seisin as would entitle his wife to dower. The exception, therefore, must be over-ruled." The exception was, to the Master's report, that the defendant was not entitled to dower; for that it ap-

Leases for lives not expiring during coverture, widow not endowable.

husband, whose widow claimed dower, and the estate came to him, by devise subject thereto; also, that the testator seemed to have intended, that the mortgage should be paid off out of his personal estate, and the rents and profits of the real estate, which would accrue before the devisee attained his age of twenty-one; at which time a moiety of the legal estate was positively directed to be conveyed to him. For although the former

peared, the estates in question were let at the time of the marriage on leases for lives, and continued so let during the coverture.

The result therefore is, that if the husband's estate be in mortgage for an estate in fee-simple previously to the marriage, and remains so during the coverture, the widow will not be entitled to dower; for at law, the whole legal estate of inheritance is in the mortgagee; and the right of redemption is merely an *equitable* title, incompetent to create a claim of dower. If the mortgage be made after marriage, then we have seen that the dower having attached by the marriage the wife must do some act, as levy a fine or suffer a recovery, in order to bar herself of dower. If a mortgage in fee be made after marriage without a fine or recovery, the wife on her husband's death may sue for her rights in a legal way, and recover a third part of the estate in the hands of the mortgagee. And if a mortgage in fee be made after marriage with the assistance of a fine or recovery wherein the wife concurs, it has been submitted (see *antea*, p. 707, in *notis*), that the wife may nevertheless redeem, and so become entitled to dower, by proceeding against the heir for a contributory share of the mortgage, and an exoneration of her estate in dower out of the personal estate of her husband, according to the rules laid down in pages 812 and 681, *antea*, of this edit.; the fine or recovery in such case, operating only as a *partial* conveyance and alienation of her rights. And it may be asked, if then a mortgage in fee after marriage in which the wife joins by fine or recovery, operates as a bar to dower, *pro tanto* only; why should not a mortgage before marriage be limited to the same effect? The answer is, that in the former case the dower has attached; in the latter it has not; and of an equity of redemption barely, whether expectant on a mortgage in fee or on a mortgage for years a widow is not endowable; and, it is scarcely necessary to add, that in the case of a mortgage in fee made before marriage, the husband on the celebration of the matrimonial contract has but a bare equitable title, of which we have seen the widow cannot be endowed. It is further open to remark, that in the case of a mortgage in fee made before marriage, if the money be paid on the day named in the condition the estate will revert in the husband, and the wife will consequently become entitled to dower; but no subsequent payment of the mortgage money by the husband will render his wife dowable if he dies before a reconveyance of the legal estate of inheritance has been taken to himself and his heirs. Bro. Abr. Dow. pl. 11. Vin. Abr. Dow. (G. 2), pl. 5. Perk. s. 392.

As to a mortgage for years made before marriage and which is subsisting at the time of the husband's death, there a legal reversion remains with the husband, to which the equity of redemption will become united, and of the legal reversion the wife will be entitled to dower. And since it is the doctrine of courts of equity, that every person having an interest in the reversion shall have an equivalent interest in the equity of redemption, the doweress may consequently redeem the mortgage. But this latter branch of the subject has been entirely exhausted in a previous note, see *antea*, p. 689, of this edit. n. (P). It is therefore merely necessary to add here, that a widow has been denied free bench of a trust estate of copyholds, on the ground, perhaps, of the decision in *Dixon v. Saville*, which, however, was very inapplicable in principle to the case before the court. *Forder v. Wade*, 4 Bro. C. C. 525.

The old cases on allowing dower of trusts are the following: *Colt v. Colt*, 1 Ch. Rep. 254. 2d. ed. *Fletcher v. Robinson*, Pre. Ch. 250, cited, S. C. 2 P. Wms. 710. cited from Reg. Lib. *Radnor v. Rotherham*, Pre. Ch. 65. *Bottemley v. Fairfax*, *ibid.* 336. *Daly v. Lynch*, 1 Bro. P. C. 538. *Ambrose v. Ambrose*, 1 P. Wms. 321. *Robinson v. Tongue*, 1 Atk. 604.

General result of cases,
1st. As to a mortgage in fee.

2d. As to a mortgage for years.

Old cases on allowing dower of trusts.

- [732] circumstance of the mortgage descending, does not appear to me to afford any argument of considerable weight in favour of the dowress, because, the only inference that could be drawn from that circumstance would be, that the mortgage being made by the ancestor, and not by the husband, it could not be concluded that there was any intention in the husband to make the mortgage a means of depriving the wife of dower (which was a distinction, that had been attempted to be made, in cases when the wife claimed dower of trusts between trusts descending and trusts made by the husband); but which inference could not be applied to the case of a mortgage, because, whether that descended to, or was made, by the husband, the intention with which it was made, was obviously with a view to raise money only, and could not, by any argument, be made to supply an inference, that it was done with a view to prevent dower: yet the latter circumstance might perhaps be considered as deserving more weight; for, if the trustee, who was himself the mortgagee, by misapplying the personal estate of the testator, and the rents and profits of his real estate, was himself the cause of the mortgage standing out, and made this
- [733] reason to hold back the conveyance of the legal estate, according to the directions of the testator, there seems as much reason for the application of the rule of equity of *considering that as done, which ought to be done*, in order to let in the widow in equity, to the same degree of title, *notwithstanding the mortgage*, as she would have had, if the trustee had conveyed the estate to the husband at the time directed, as there was for the application of it for that purpose, *notwithstanding a trust (s)*.

And reconciled. And it is observable that, in this point of view, the cases of *Banks v. Sutton*, and *Dixon v. Sir George Saville*, are perfectly reconcilable, and may stand together, the former being considered as establishing the general principle of law, that the wife of one entitled to an equity of redemption of a mortgage in fee, shall not be entitled to dower out of such estate; the

The rule "that is considered as done, which ought to be done," applies to every case except dower.

(S) The rule in equity, that what has been agreed to be done for valuable consideration, is considered for many purposes as actually done, *holds in every case except in dower*. *Crabtree v. Bramble*, 3 Atk. 687. So much, therefore, of the learned author's argument as depends on this principle of equity, as also that portion of Sir Joseph Jekyll's judgment in *Banks v. Sutton*, where he observes, that when an act is to be done by a trustee, that is to be looked upon as done, &c. (see 2 P. Wms. 706. 2 Eq. Ca. Abr. 385,) must be considered as disposed of and over-ruled.

latter, as an exception to that general rule, as falling under another and distinct principle of equity. *Sed quære* (T).

And that there may be exceptions to this rule, as to trusts, is evinced by the resolution in the case of *Otway v. Hudson* (o); in which case, tenant in tail of the trust of a copyhold estate, having desired the lord to admit him, and being refused, and having brought a bill against the trustees to have a surrender made him of the legal estate, died, *pending the suit*; and, although the husband was never seised of the legal estate of the copyhold, yet the widow was decreed her free-bench; which was a decision contrary to the rule laid down in the principal case, but founded upon an equity raised in favour of the wife; because of the great and obstinate delay of the trustee, who refused, and stood out a bill requiring him to convey.

It was formerly a doubt whether (p), upon a mortgage in fee, the mortgaged estate did not become liable to the dower of the wife of the mortgagee (q), which occasioned the introduction of long terms for years by way of mortgage, with condition to be void upon repayment of the mortgage-money; but that doubt hath been long since over-ruled in our courts of

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Trustee delaying to convey legal estate to husband, widow decreed free-bench of equitable estate (v).

Wife of mortgagee in fee not entitled to dower in equity.

(o) *Otway v. Hudson*, 2 Vern. 583.
[S. C. 2 Ch. Ca. 174.—Ed.] N. B.
This was a case of customary dower.

Vide 2 Atk. 526. per Ld. Hardwicke.
(p) Litt. sec. 357.
(q) 2 Bla. Com. 158.

(T) The learned author here endeavours to shew that the two cases of *Banks v. Sutton* and *Dixon v. Saville*, are dissimilar, and therefore that the former ought not to be considered as over-ruled. Lord Alvanley, however, has said, that *Banks v. Sutton* is not to be supported; see antea, p. 699, of this edit. n. (R); and Lord Talbot, in *Attorney-General v. Lockley*, App. Sug. V. & P. No. xvii. p. 33, 5th edit., is reported to have declared that the true reason for the decree in *Banks v. Sutton* was, that the wife married Sutton on the expectation of the estate, and it was a fraud in the husband and not to call for the settlement. If so, all that was said in *Banks v. Sutton* about dower and its incidents, was extra-judicial, and of little weight against the unanimous decree of the three Judges in *Dixon v. Saville*.

Reconciliation of cases in text unavailable.

(U) As a general rule, a widow will not be allowed free-bench of a trust or equity of redemption in a copyhold estate: to allow that, would be to raise an anomaly upon an anomaly, according to Lord Loughborough in *Forder v. Wade*, 4 Bro. C. C. 521. Whether a court of equity would now permit a widow to avail herself of the delay and obstinacy of a trustee may perhaps be a matter of doubt, especially if Lord Hardwicke's observations in *Crabtree v. Bramble*, mentioned in the last note but one can be supported. And it is worthy of notice that one great reason for allowing free-bench in *Otway v. Hudson* arose from the circumstance of the husband's being in possession and in actual receipt of the rents and profits up to the time of his death. See for this fact, Mr. Raithby's note (2) to 2 Vern. 546, who refers to Reg. lib. 1706, B. fol. 192. And there is in equity this distinction between an actual assignment, and a mere voluntary covenant to assign, that equity will not construe such a covenant beyond the letter. *Basce v. Grey*, 2 Vern. 692.

No free-bench of equity of redemption.

equity, and it is now clearly settled, that *an equity of redemption* is not liable to the dower of the wife of the mortgagee (r) (w).

(r) Hard. 466. Cro. Car. 190, 1.

Correction of text.

(W) Read, "and it is now clearly settled, that the legal estate in the mortgagee will not be liable to the dower of *his* wife." See *antea*, of this edit. p. 7, n. (D), and to the authorities there cited, add 1 Rol. Abr. 6. 79, pl. 50, *Bevant v. Pope*, 2 Freem. 71, and *Hinton v. Hinton*, 2 Ves. 633.

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CAP. XVII.

OF MORTGAGES MADE BY THE HUSBAND AND WIFE,
OR THE HUSBAND ALONE, OF THE WIFE'S ESTATE,
AND HIS INTEREST IN MORTGAGE MONEY DUE TO
HER (A).

Mortgage by husband and wife, without

AS the husband, by virtue of his marriage, obtains no other interest in his wife's estates of inheritance, than an estate of freehold, in her right, for their joint lives in case there be no issue of the marriage, and for his life, as tenant by the curtesy, if

Contents of chapter.

(A) This chapter contains, 1st. A collection of cases, shewing the necessity of the wife's joining in a fine on the mortgage of her estate, and herein of the effect of the husband's covenant, that his wife shall levy a fine, from hence to p. 741; 2d. An inquiry to whom the equity of redemption on a mortgage of the wife's leasehold estate belongs, from 741 to 743; 3d. An investigation of the husband's power to charge or assign his wife's trust terms, from 743 to 752; 4th. A statement of the law concerning the surviving wife's confirmation of her husband's void mortgage, from 752 to 758; 5th. A consideration of the extent to which the wife's estate is liable on joining her husband in a mortgage of her inheritance, and herein of the wife's right to exoneration out of the husband's personal estate, from 753 to 762; 6th. A disquisition concerning the effect of the wife's fine, when she joins her husband in a mortgage of her estate of freehold or inheritance, especially as to the right of redemption, from 762 to 764; 7th. An enumeration of the instances wherein the husband will be entitled to his wife's mortgages and *chooses in action*, either as a purchaser, by means of a settlement, or as a volunteer *jure mariti*, by reduction of them into possession, from 764 to 781; 8th. An examination of the authorities respecting a provision for the wife and family, in case the husband or his assignees (either in bankruptcy or otherwise) deprives the wife of her mortgages and equitable *chooses in action*, from 781 to 797; and, 9th. A reference to a few other matters relating to the subject of this chapter, from 797 to the end.

there be (a); it follows, of course, that he alone cannot make a valid mortgage thereof, to be binding upon her and her heirs, for any longer period (b). And therefore, where one, seised in fee, in right of his wife, of a share of the New River water, joined with her, and made a mortgage, by way of lease for 1000 years, reserving a pepper-corn rent, by deed without fine, and died; a bill brought by the mortgagee to foreclose, was dismissed by the Master of the Rolls, saying, that a fine might be, and usually was, levied, of New River shares, and in this case, there ought to have been one, it being the inheritance of the wife; and that, this having been omitted, and the lease expiring by the death of the husband, the mortgage was also thereby determined, and nothing remained to foreclose (B).

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And where after marriage the husband made a purchase of a copyhold estate, and took the surrender to himself, and his wife, and his daughter, and their heirs; and he afterwards, as being visible owner of the estate, took upon him to make a conditional surrender by way of mortgage to a stranger, and afterwards died (c); a bill was filed in Chancery against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the mortgagee, who was a purchaser; *sed non allocatur*, for, by the Court, the husband and wife took one moiety by intireties, so that the husband could not *alien* or *dispose* of it, to bind the wife, and the other moiety was well vested in the daughter (c).

Purchase in name of husband wife and daughter, an advancement, and husband cannot mortgage.

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(a) Co. Litt. 351.

2 P. Wms. 127, [et vide 2 Fonb. 312.

(b) *Bryan v. Woolly*, 4 Vin. Abr.

—Ed.]

57, pl. 19. *Drybutter v. Bartholomew*,(c) *Back v. Andrews*, 2 Vern. 120.

(B) Shares of the New River Company are always acted upon as real estate, and recoveries are suffered, and fines levied of them in the same manner as upon any other description of inheritable property, *Buckridge v. Ingram*, 2 Ves. jun. 652; where it was held that the shares in the navigation of the River Avon, under the statute of 10 Anne, are real estate, and subject to dower. Whatever comes properly within the description of a tenement, or, to use the words of the Master of the Rolls in the above mentioned case of *Buckridge v. Ingram*, "wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or exercisable within it, it is that sort of property which the law denominates real," see 2 Ves. jun. 664.

River shares are real estate.

As to confirmations of the mortgage by the wife after coverture by payment of interest or otherwise, see *postea*, 752, 753, where the principal case is further commented on, and its authority as to these latter points questioned.

(C) Where a husband purchased a term for himself and his wife and the survivor, and after mortgaged it without his wife, and then died indebted, the equity of redemption was held to be assets; see the case of *Watts v. Thomas*, 2 P. Wms. 364, and cited *antea*, 290; of this edition, in the text, and *postea*, 800. As to the advancement by purchase in the name of a wife or child, (which by the way is not much within the scope of a treatise on mortgages); see *antea*, 713, of this edition, in the text and notes.

Reference to prior cases.

Wife may mortgage her estate by fine.

Whether it be legal or trust estate.

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But, if the wife joins in a mortgage of her lands and levies a fine thereof, this will be binding upon her and her heirs, notwithstanding the coverture. For as, by such process, she may make an absolute alienation of her real estate, so may she make a conditional one thereof (D).

And a fine, levied by a *feme covert*, will make a mortgage of her trust, as well as of her legal estate, valid (d). Thus, where the defendant P. before her marriage, conveyed, with her intended and after husband's privity (E), the premises in question to trustees, in trust, to pay the rents and profits to her sole and separate use for her life, and, after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint, and, for want of such appointment, then to her own right heirs for ever. Afterwards, she mortgaged part of the lands to the plaintiff for a term of five hundred years, to secure the sum of 1000*l.* and a fine was levied by husband and wife, who both declared the uses, as to the mortgaged premises, to be to the plaintiff for securing the principal and interest. On a bill exhibited, the wife, by order of Court, answered separately; insisting, as to this point, that the legal estate being in the trustees, the parties to the fine had not such an estate therein, whereof a fine could be levied to bar her right. But the Lord Chancellor, as to this objection, observed, it was very well known that the operation of fines and recoveries was the same upon trusts as upon legal estates (dd), and if so, it must inevitably follow, that an estate for life limited to the wife,

(d) *Penne v. Peacock*, Ca. temp. Talb. 41.

(dd) [See Cov. on Rec. p. 322.—Ed.]

Wife not a necessary party to deed declaring uses of fine, in which she has joined.

(D) And the wife joining in the fine will be bound by the deed leading or declaring the uses, though no party to such deed, provided the uses be not inconsistent with the intent and purpose for which the fine was levied. *Swanton v. Raven*, 3 Atk. 105, and *Beckwith's case*, 2 Co. 57. This proviso is a very essential member of the sentence: if omitted, the husband, having obtained his wife's consent to a slight incumbrance, and procured her concurrence in a fine for the purpose of securing the mortgagee, might (without any opposition from the wife's friends, or the judge before whom she is examined,) by a subsequent and clandestine declaration of other uses, be able totally to make away with her estate, which the solemnity of the fine was meant to prevent.—In *Fleetwood v. Templeman*, 2 Atk. 79. S. C. postea, 1147, where a fine was covenanted to be levied in Easter Term following the date of the deed leading the uses, but no fine was levied till three years afterwards, when the husband and wife joined in a new declaration of uses of the fine "theretofore levied," it was held, that this declaration was binding, notwithstanding it differed materially from the first declaration; for that the covenant to levy the fine in the first deed was not strictly pursued.

(E) The privity of the husband is absolutely necessary to the validity of the settlement made by the wife of her estate after the marriage treaty has commenced. See *Howard v. Hooker*, 2 Ch. Rep. 81, and *Strathmore v. Bowes*, 1 Ves. jun. 28, and postea, 750.

remainder to her own right heirs in default of any appointment made by her last will, was disposed of by the fine; and if no such remainder had been limited by it, yet as the estate was the wife's, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred: and his Lordship decreed the trustees to convey to the plaintiffs the mortgagees.

Where a husband, for a valuable consideration, covenanted that his wife should join with him in a fine, the Court of Chancery decreed the husband to perform it, for that he had undertaken it, and he must lie by it if he did not perform it(e): because in such case it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose, and the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee.

But if it can be made appear to be impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them) surely the Court would not decree an impossibility (f); especially if the husband offer to return all the money, with interest and costs, and to answer all the damages (f).

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Specific performance of husband's covenant that wife should levy a fine, decreed.

Quare, if she refuse to concur.

(e) *Barington v. Horn*, 2 Eq. Ca. Abr. 17, pl. 7. 5 Vin. Abr. 547, pl. 15. 3 P. Wms. 189, et note (B) there.

(f) *Winter v. Devereux*, 3 P. Wms.

189, n. (B), [et vide what is said by Lord Eldon, of a covenant for further assurance, ante, p. 690, of this edition, n. (P).—Ed.]

(F) The cases on this head are confictory. On the one side may be classed *Barington v. Horn*, ubi supra, *Rust v. Whittle*, Toth. 94, *Griffin v. Taylor*, ibid. 106, *Anon.* 2 Ch. Ca. 53, *Hall v. Hardy*, 3 P. Wms. 188, *Withers v. Pinchard*, in Chan. July 7th, 1795, and *Morris v. Stephenson*, 7 Ves. 474. On the other side may be ranked *Preston v. Wasey*, Pre. Ch. 76, *Otread v. Round*, 4 Vin. Abr. 203, pl. 4, *Sedgwick v. Hargrave*, 2 Ves. 56, *Daniel v. Adams*, Amb. 495, *Moreau's case*, 2 W. Bl. 1205, *Emery v. Wase*, 5 Ves. 848, *Davis v. Jones*, 1 New Rep. 269, *Howell v. George*, 1 Madd. Rep. 1, and *Brick v. Whelley*, cited ibid. 7, n.

I. As to the cases which confirm the doctrine in the text:—In *Rust v. Whittle*, Toth. 94, the court decreed, that the defendant should compel his wife, and another man's wife, being the other defendant, to levy a fine, and join in the assurance; and in *Griffin v. Taylor*, ibid. 106, the court ordered a man to procure his wife to acknowledge a fine of mortgage lands. On the same principle the *Anonymous case* in 2 Ch. Ca. 53, was decided. There a father and son *infra etatem*, covenanted to convey lands for valuable consideration, on the son's coming of age. The father was decreed to procure his son's confirmation of the conveyance. In the next case, Sir Joseph Jekyll said, there had been a hundred precedents where it had been held, that if the husband for a valuable consideration, covenants, that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it. *Hall v. Hardy*, 3 P. Wms. 188.

The unreported case of *Withers v. Pinchard*, in Chan. 7th July, 1795, mentioned by the counsel, arg. 7 Ves. 475, seems to have proceeded on a

Husband's covenant that wife shall join him in fine, enforced.

Though wife never gave her consent to sell.

Wife not barred, if fine not perfected before husband's death.

A covenant from the husband and wife, that he and his wife will levy a fine, will not be binding upon her in case of his

similar principle. There an agreement was entered into by a man on behalf of himself and wife, to sell the estate in question to the plaintiff. One moiety was the wife's. The estate was settled to certain uses, with a power of revocation in the husband and wife, with consent of the trustees. The wife by her answer, as well as the husband, swore, that she never gave her consent to the sale; and they stated, that they believed, the trustees would not consent to the revocation of the uses. Nevertheless, the Lord Chancellor decreed a specific performance; and that the husband should convey, and should procure all proper parties to convey, as the Master should direct, if the parties should differ concerning the conveyance.

Husband decreed to procure his wife's concurrence in surrender.

This case was followed by *Morris v. Stephenson*, 7 Ves. 474, where the husband, under circumstances, was decreed to procure his wife to join in a surrender of a copyhold estate, which he had covenanted (the wife consenting) that he and his wife should within one month, surrender to the use of a trustee in trust to sell and pay debts. Sir William Grant, M. R. observed, that the defendant (the husband) did not allege that he was unable to procure his wife to join; nor did he offer to pay the debt; it was impossible to put the plaintiff in the same situation, as if the deed of covenant had never been executed; for the plaintiff would have had an execution against the husband, if he had not redeemed himself by giving this security. It was unnecessary, therefore, to discuss Lord Cowper's reasoning in *Otread v. Round*, (a case after-mentioned); that case being so extremely dissimilar to the one before his Honour. The defendant there stated absolute inability to perform, and offered to put the other party in the same situation, as if the agreement had never taken place. Here the only objection stated to the performance of the agreement was, that such agreement was obtained by fraud; not, that the wife was unwilling to enable her husband to perform it, merely because it was incompetent in him to dispose of her estate; but because he and she were imposed upon in entering into and executing the deed. The case of *Withers v. Pinchard*, in 1795, was infinitely stronger; for the wife never had expressed any assent. The first time she was consulted, she expressed her disagreement. The contract was made without her knowledge: yet she was decreed to perform it without regard to the possible consequence resulting—that to relieve him she might be under the necessity of disposing of her estate. But here the wife executed the deed; and even in the covenant it was declared, that it was entered into with the express consent of the wife. In such a case it was too much, his Honour thought, to say that there should be no specific performance, merely because the defendant was a husband, and therefore exempted from performing his covenant respecting his wife's estate, for *non constat* that there was any difficulty in obtaining her consent. The decree, therefore, was, that the husband should specifically perform his agreement, and procure his wife to join in the fine.

Cases annulling rule in text.

II. The cases which tend to disaffirm the doctrine advanced by the learned author, are the most numerous—the more modern—and the best considered. Consequently little doubt can be entertained of their authority to annul the rule in *Barington v. Horn*; but it should be remembered, that no case has expressly decided that the husband shall not be bound specifically to perform his covenant, that his wife shall join him in levying a fine. The case of *Preston v. Wasey*, Pre. Ch. 76, is the first that occurs in the books on this side of the question. There, the defendant's wife was the heiress at law of the testator under whose will the plaintiff claimed. The plaintiff having some reason to doubt the validity of the will, prevailed on the defendant and his wife, for a small consideration, to enter into articles to convey the lands in question to make good the will, under pretence that there was some mistake therein. The bill was for a specific performance of the articles, but it appearing that the defendant and his wife were not well apprised of the interest they had in the lands, and that there was some art used in procuring their concurrence, the Master of the Rolls would not decree the prayer of the bill, but left the plaintiff to his remedy at law; and on appeal, my Lord Keeper affirmed the decree, but went upon the fraud, and did not seem to take notice of its being the inheritance of a

death. Therefore, where one (g) seised in tail, for valuable consideration bargained and sold to another in fee, covenanting

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(g) *Hody v. Luan*, 1 Rol. Abr. 375. Mich. 5 Car. 1. S. C. 1 Eq. Ca. Abr. 61, 2.

feme covert. From this case, therefore, little more can be gleaned than that it seems to militate against the doctrine propounded in the previous cases.

The next case, however, is strong in confirmation of the rule, that the husband will not be bound in equity to perform his covenant (though founded on a valuable consideration) to procure his wife to join with him in a fine or other conveyance. The case is that of *Otreud v. Round*, 4 Vin. Abr. 203, pl. 4, where the husband and wife, for a valuable consideration, by lease and release, conveyed the wife's lands in fee, and the husband covenanted that she should levy a fine of them to the use of the purchaser. The wife afterwards refused to levy the fine, upon which the purchaser filed a bill for a specific performance of the covenant. The husband, by answer, admitted the covenant, and said, that he was ready to levy a fine, but that his wife refused to join him, and that he could not persuade her to do so. Lord Cowper, who decided the case of *Barington v. Horn*, (ubi supra in the text) observed, that it was a tender point to compel the husband, by a decree, to procure his wife to levy a fine, although there had been some precedents in the court for it; and that it was a great breach upon the wisdom of the law, which secured the wife's lands from being aliened by her husband without her free and voluntary consent, to lay a necessity upon her to part with her lands, or otherwise to be the cause of her husband lying in prison all his days; and his Lordship declared, that he did not in that case think it proper to decree a specific performance of the covenant, but that the husband must refund the purchase-money which he had received, with costs.

Husband not bound by covenant to procure his wife to levy a fine, if she refuse.

So in *Sedgwick v. Hargrave*, 2 Ves. 56, et vide Belt's Supp. 273, the husband and wife, in consideration of 200*l.* renounced all claim to the estate in question, and by a joint answer in Chancery they both disclaimed all right whatever to the premises, and declared that they were willing to release the wife's title to the lands, and to join in any conveyance, or to do what act the court should think proper. In the suit wherein this answer was filed, there were no further proceedings. But on a sale of the estate thirty years afterwards by the person who had been in possession that time, the husband hinted to the purchaser that his wife had a claim on the premises sold, and that a good title could not be made without her concurrence. The purchaser then declined proceeding in his contract, unless this cloud were removed. Whereupon the vendor filed a bill against him for specific performance, making the husband and wife parties, defendants, calling upon them to set out the nature of their claim, and praying that they might be decreed to convey or refund the said 200*l.*, with interest. Sir John Strange, M. R. said he could not make a personal decree on the wife to join in the title, for no act had been done by her that the court could say was a parting with her interest [see antea, p. 708, as to a joint answer], and his Honour feared that a bare decree on the husband to join or procure his wife to join, would not answer the ends of justice; but without doubt the 200*l.* should be refunded. The decree was, that J. H. the husband, should join, and procure his wife to join, within a time to be appointed by the Master; and if they did not, then that J. H. should refund the 200*l.* to the plaintiff, and pay costs.—These cases shew that the court will not in every instance decree a specific performance of the husband's covenant that the wife shall join him in making an effectual assurance of the lands, but that it will make a decree *sub modo* only, that is, in the alternative, namely, that the husband shall specifically perform his agreement, if he can procure his wife to join, but if he can prove that his wife refuses to join with him in the assurance required, the other party will be left to his remedy at law.

Same law.

In *Daniel v. Adams*, Amb. 495, baron and feme had a joint power to sell the wife's estate. The baron employed an agent of his own to sell the property, delivering merely his wife's compliments to the agent in a letter to him, conferring the authority to sell. This was held to be no proof, that the wife concurred in the authority to the agent, and Sir Thomas Sewell,

Husband directing agent to sell, no proof of his having obtained wife's concurrence.

that he and his wife would levy a fine for better assurance ; and it was agreed, that 30*l*. part of the consideration-money, should

Wife may levy fine, subject to husband's disagreement.

M. R. said, that this was not such a case as would induce the court to compel the husband to procure his wife to convey. That where the wife was bound, she must have done something to confirm the agreement, as to receive some benefit from it, *Drury v. Drury*, 1 Ch. Rep. 49. That the note of *Barker v. Child*, was very loose. That in *Harington v. Horn*, the husband had received the consideration, and in *Hall v. Hardy*, he had received part, and was willing to receive the rest. That those cases went on the ground of fraud ; and, therefore, his Honour added, he must dismiss the bill ; which he did ; but without costs.

Moreau's Case, 2 W. Bl. 1205, is the next in order. There the husband had sold and covenanted, that he and his wife when of age should levy a fine. The wife attained her age of twenty-one years, and at first refused to levy the fine. Her husband afterwards went abroad, and then she consented to levy the fine, and her acknowledgment as a *feme sole*, was received by the Chief Justice of the Court of Common Pleas. This fine was levied without prejudice to the husband's right to avoid the same. The court would not by any means preclude him from the right to question its validity. All the Chief Justice did, was to enable the wife to bind herself by receiving the fine from her, as if she had been a *feme sole*. But from the whole tenour of the case it appears, that his Lordship did not consider the husband's covenant to be binding on the wife ; for at first he would make no rule to authenticate the fine, and afterwards did it *de bene esse* merely, the wife voluntarily assenting thereto. See further on this head, *Stead v. Izard*, 1 New. Rep. 312.

Reasons against compelling husband to procure wife to concur.

We now turn to the modern decisions on this subject, and find the doctrine placed on a very different footing. Two grounds are taken, whereon powerful arguments against the adoption of the rule in the text are raised. The first is, that if the husband's agreement be held binding on the wife, then her interests may be bound by agreement, which could not be bound by conveyance ; and the second, that if the doctrine be adopted it would contravene the policy of the law ; for that the wife could not truly aver, that she freely and voluntarily assented to the fine, when in fact she was compelled to levy it by the decree of the court, or the influence and persuasion of her husband. These arguments were in part relied on in *Emery v. Wase*, 5 Ves. 846. In that case, I. W. his daughters and their husbands, entered into an agreement for the sale of an estate to which I. W. and his daughters were entitled, on a price to be fixed by an arbitrator appointed by all parties. The arbitrator, it was said by the vendors, had greatly undervalued the estate, and on that ground they resisted a bill filed by the purchaser for a specific performance of the agreement. Lord Alvanley, M. R., felt great hesitation in infringing on the award of an arbitrator chosen by consent of all parties, which, he said, could not be done either at law or in equity, unless upon fraud and imposition or gross mistake ; but as against the married women, he had no conception that such an agreement could be enforced. That, indeed, would be binding their interests by agreement, which could not be bound by conveyance. How far the husband was liable in damages for not making good the agreement, or how far in equity he would be compelled to prevail upon his wife was another consideration. There had been instances of committing the husband to the Fleet, till the wife should do the act ; and there was one instance where the husband staid a great while in prison, and then made it appear that he could not prevail on his wife, and was discharged. The bill in the case before his Lordship was, it was true, resisted expressly on this ground ; but Lord Alvanley thought, that a mere simple agreement to sell at whatever price a third person should name, was not such an agreement as the court would be very desirous of enforcing, and when he saw that some of the parties were not competent, (being married women,) he should hold, that the purchaser had not made out a right to a specific performance. The plaintiff had that which was open to every one, a remedy at law for the breach of the agreement ; to which remedy under the circumstances, his Lordship left him. The bill was consequently dismissed, but without costs. On appeal to the Chancellor, the decree at the Rolls was affirmed, see 8 Ves. 519. The doctrine, it is conceived, was on that occasion placed in its true

Because, first, that would be binding interests by agreement, which could not be bound by conveyance.

be paid unto the wife upon the consance thereof. A fine was accordingly acknowledged by them before a judge on the cir-

light, and it is to be regretted, that the noble and learned Lord who affirmed the decree, did not finally fix the point conformably to his opinion by actual decision, but his Lordship chose rather to rely on other grounds, than pronounce a decided opinion on a question which he was not expressly called on to determine.

Lord Eldon observed, (8 Ves. 514.):—"By this appeal, I am called upon to reverse a judgment, that appears to have been made upon great consideration. Certainly the general point is of great importance; whether the contract of the husband, which, however, this was not intended to be, but that of the daughters, is to be executed against the husband by a court of equity; in effect compelling the husband to compel his wife to levy a fine which is a voluntary act. The policy of the law is, that a wife is not to part with her property, but by her own spontaneous and free will. If this were perfectly *res integra* I should hesitate long, before I should say, that the husband is to be understood to have gained her consent, and the presumption is to be made, that he obtained it before the bargain, to avoid all the fraud, that may be afterwards practised to procure it. I should have hesitated long in following up that presumption, rather than the principle and policy of the law; for if a man chooses to contract for the estate of a married woman, or an estate to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who according to law, cannot part with her property but by her own free will, expressed at the time of passing an act of record, takes advantage of the *locus penitentie*; and why is not the purchaser to take his chance of damages against the husband? If the cases have determined this question so, that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must in many instances be placed, can prevail against their authority, it must be so. For the sake of illustration however:—Suppose the husband procures the consent of his wife even by the mildest means; persuades and influences her by the difficulties he has got into; and she is examined in equity by the judge, who has made the decree upon her husband; then, if upon the submission of all the considerations which ought to be submitted to her in this court and the court of Common Pleas; she says, she thinks it in her situation not fit for her to part with her property, the court must send the husband to gaol; telling her, she never ought to relieve him from that state; and all this for the benefit of a person who cannot have a specific performance certainly, but who may have damages; and who sets up his title to a specific performance in opposition to the policy of the law. Upon the first ground, therefore, there is difficulty enough to make me pause, before I should follow the cases of *Hall v. Hardy*, and *Withers v. Pinchard*, and I am not sure, whether it is not proper so have the judgment of the House of Lords, to determine, which of these decisions ought to bind us. As to the expression, used by Lord Cowper, that this jurisdiction is to be very sparingly exercised, certainly it is very dissatisfactory to be informed, that it is, and it is not, to be done." But his Lordship was strongly inclined to think, that the decree at the Rolls was right on other grounds, which he stated at large, and concluded by observing, that he considered himself fairly justified in following Lord Alvanley, at least as far as Lord Cowper's principle would authorize him;—that if the property of a married woman is to be affected through the covenant of her husband, the court ought to act sparingly upon that; and upon the whole there was reasonable doubt enough, whether the valuation was made upon such a principle, that it ought to bind married women. And, therefore, his Lordship affirmed the decree as above stated.

Sir James Mansfield, C. J., in a late case in the court of Common Pleas, (where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence,) said, that the covenant upon which the action was brought, was such as the court of Chancery would not now enforce; and, he added, that nothing could be more absurd, than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into prison, when

And, second, it would be contrary to policy of law to compel wife to levy a fine—that being a free act.

General rule, that equity will not compel husband to procure wife to levy fine.

cuit in the vacation, and the 30 $\frac{1}{2}$ paid her, the husband being sick in bed; and afterwards, and before the ensuing term, he

the general principle of the law was, that a married woman should not be compelled to levy a fine, *Davis v. Jones*, 1 New. Rep. 269. Hence we may infer, if this common law dictum can be relied on, (and the learned judge by whom it was uttered, was very conversant in the doctrines of equity, per Sir T. Plumer, V. C. 1 Madd. Rep. 7.), that a court of equity will in general refuse to compel the husband to procure his wife to join in levying the fine. A similar notion seems to have prevailed in *Howell v. George*, 1 Madd. Rep. 6, though with some reservation as to the full admission of the rule in all its latitude. In that case the husband, (who was the defendant,) conceived himself to possess an exclusive dominion over the estate, when he entered into the agreement for sale. It afterwards turned out that he was only tenant for life, and he stated in his answer, that his wife and son refused to join with him in suffering a recovery, so as to enable him to perform his agreement. He said, that he was willing to convey as far as he could, and to compensate the plaintiff for any injury he might have sustained. At the hearing, it was contended, that the defendant ought to be compelled to procure his wife and son to join with him in a recovery; or, that he ought to acquire a fee in the lands in question, and convey them to the plaintiff. "It was not much pressed in argument," observed Sir T. Plumer, in the course of his judgment, "that the husband ought to be decreed to procure his wife and son to join in a recovery. Indeed it could not be argued, that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts, which ought only to be spontaneously done. Those cases in which a husband was compelled to make his wife concur, had been, where he had agreed she should convey, and her consent might be supposed to have been previously obtained, but in this case there was no pretence that the defendant agreed that his wife and son should join in a recovery, and none of the cases had gone so far as to say, that a father could be compelled to procure his son to join in a recovery." Specific performance of the agreement was therefore refused. But see an instance, where a father was decreed to procure his son to join him in completing an assurance, which was made by the father and son, while the son was *infra aetatem*. *Anon.* 2 Ch. Ca. 53, cited *supra*, in the first section of this note.

Result of cases.

From this review of the cases it appears, that it is not definitively settled, whether if a husband sells or mortgages his wife's estate, and covenants that she shall levy a fine for further assurance, he will, in every case, be decreed specifically to perform his contract. The cases evidently lean, and that very strongly, towards the side of the husband; and in *Brick v. Whelley* (*ubi supra*) especially, a decided opinion in the husband's favour, seems to have been pronounced by the House of Lords, as far as can be collected from a short note of that case in Lord Harecourt's MS. tables, where the result is stated to be that, "no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution." Dom. Proc. 9th February, 1721. It is also observable, that Lord Redesdale, in *Costigan v. Hastler*, 2 Sch. & Lef. 166, declares the broad principle to be, that when a person undertakes to do a thing which he can himself do, or has the means of making others do, the court will compel him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. Lord C. B. Gilbert put it doubtfully, whether the court would make the decree, if the bill be against the husband only; because the husband would then compel his wife, who ought not, by law, to convey by means of any compulsion from her husband, *Lex. Præc.* 245. We may further add, that all the text writers of the present day treat the rule to be, that the court will in every case, feel strongly inclined to refuse a specific performance of the husband's agreement, that his wife shall join him in effectually conveying the estate. See 1 Fonb. Tr. Eq. 294, n. (y) 5th edit. Sug. V. & P. 181. 5th edit., and 1 Madd. Ch. 399. 2d edition.

Observations on Mr. Roper's view of the doctrine.

Mr. Roper, indeed, in his late excellent work on the law of property as relating to husband and wife, conceives the authorities to establish the general proposition—that the husband will be bound in equity to perform his covenant, founded upon a valuable consideration, to procure his wife to

died; whereupon the wife stopped passing the fine, and brought a writ of dower. It was held the bargainee had no remedy against the dowress, because it was contrary to a maxim in law, *that a feme covert should be bound without a fine.*

Yet in a short note of the case of *Baker v. Child* (h), it is said to have been determined, that where a *feme covert*, by agreement made with her husband, was to surrender or levy a fine, the court would, by decree, compel her to performance thereof, although the husband died before it was done. But Mr. Murray observed, in the case of *Thayer v. Gould* (i), before the Lord Chancellor, Michaelmas, 13 Geo. 2, that, upon looking into the register's minutes, it appeared the court made no decree in the last case, but that it was by consent referred to Mr. Serjeant Rawlinson for his arbitration.—From this reference, however, we may fairly conclude, that there were circumstances in this case which rendered the decision of it doubtful at least; as, had it been clear that the court would have released the wife from the agreement, she certainly never would have submitted to an arbitration (g).

Baker v. Child,
contra.

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- (h) *Baker v. Child*, 2 Vern. 61. vide Com. Dig. Cha. (2 M. 6.) vol. ii.
(i) 1 Eq. Ca. Abr. 62, n. (A), [et p. 112. 386, 8vo. ed.—Ed.]

join with him in a fine or other conveyance. "The principle," the learned gentleman observes, "on which this rule is founded, does not appear harsh or unsond: the husband ought to know the state of his wife's mind before he enters into such stipulations; and with the exception, when it appears that the wife will not concur, and the husband can re-place the purchaser in the same situation as he was previously to the transaction, it may probably be considered, that the court will decree a specific performance by the husband of his covenant, that his wife shall concur with him in levying a fine." 1 Rep. Bar. & Fem. 537. Mr. Roper may not possibly have been apprized of the recent cases of *Davis v. Jones*, *Hewell v. George*, and *Brick v. Whelley*, at least they are not noticed by him in the previous review of the authorities which he enters into at considerable length; and this, perhaps, may account for his difference of opinion, if, indeed, there be any, for the above exception, in a great measure, annuls the applicability of his general rule.

(G) Sir Thomas Sewell, M. R. in Amb. 498. stated the note of *Baker v. Child*, (ubi supra, in text) to be very loose, and passed it over without further observation. It still, however, continues to be cited as an existing authority, see Scriv. Cop. 263. n. 2d edit., and 1 Madd. Ch. 399. 2d edit. The analogous case of an imperfect fine, by reason of the death of a tenant in tail before the completion of the proceedings, (see *Wharton v. Wharton*, 2 Vern. 3. *Weale v. Lower*, ibid. 306. cited), is not exactly parallel, for there the person against whom the agreement is sought to be performed, has not individually entered into a covenant to levy a fine, and he takes the estate not as heir or assignee, on whom the ancestor's covenant may be held binding, but *per formam doni*, by title paramount the estate of his ancestor, whereas, in the case of a wife covenanting with her husband to levy a fine, and refusing after his death to complete the same, it may be argued, that by the agreement during coverture her conscience will be bound; and, therefore, that a court of equity would compel her to execute a contract which she deliberately entered into, and but for the death of her husband (an act of God), she would volun-

Note of Baker v. Child, too loose to be relied on.

Husband may charge or assign term, held by A. B. in trust for his wife.

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Latter doctrine disapproved by Finch, C.

And in the case of *Pitt v. Hunt* (n), where the wife before marriage being possessed of a long term for years, and A. the person who was to marry her, being indebted 400*l.* to I. S., by agreement of A. and I. S., made a lease to I. S. for ten years to secure payment of the 400*l.*, the lands being then valued at 80*l. per annum.* And by indenture, *sealed in presence of her husband*, assigned the residue of the term to friends in trust, to be at her disposal whether sole or covert (but no other words to exclude her husband); and she brought in money and other estate to the value of 600*l.* She married. Afterwards the creditors of the husband obtained judgment in debt against him; and, on a *fiery facias*, the sheriffs sold the residue of the term. The vendees had a decree against the trustees of the wife for the term; and the reason given by the Lord Chancellor was, because the Lords in Parliament had reversed a decree obtained by Lady Turner. And the Chancellor held it not fit a decree should be one way in Parliament, and in another way there; but declared it against his own opinion. And the reporter says, that the husband, in this case, forsook his wife, refused reconciliation, and allowed her nothing, &c. yet decreed *ut supra*.

In the last case it appears, that Lord Chancellor Finch was much dissatisfied with the resolution of the Lords in *Sir Edward Turner's case*; for in *Vernon* it is said, he seemed to wonder at that resolution, and said it could not amount to an act of parliament to change the law; and that although, at first, there possibly was no great reason for those resolutions that the husband could not dispose of a trust for the wife made without his privity before marriage, yet, the law being so settled, people made provisions for their children, according to what the law was then taken to be, and now these provisions were defeated by this new resolution. And he commended the saying of Chief Baron Walker, *viz*: "It is no matter what the law is, so as it be known what it is." (M)

(n) 2 Ch. Ca. 73. S. C. 1 Vern. 18. 2 Freem. 78. Mich. Term, 23 Car. 2.

Trust term of wife within husband's power, except settled to her separate use.

Rep. 224.—Yet this can scarcely be the case, as in *Pitt v. Hunt*, *ubi supra*, the same Noble Lord declared the reversal of *Turner's case* to be against his own opinion.

(M) *Sir Edward Turner's case* is generally treated as the first determination, establishing the right of the husband to dispose of the trust term of his wife; but there is a prior case clearly acknowledging the doctrine, namely, that of *Bullock v. Knight*, 1 Ch. Ca. 265. In that case, Sir John King, for the plaintiff, objected, that the trust of a term limited to a *feme covert* was disposable by the husband, and that his alienation was binding

And a covenant by the husband that he will convey a term belonging to his wife, is such a disposition thereof as will bind her in equity. Thus where A., being a *feme sole* possessed of a long term of years, married with R., who having occasion for money, borrowed it of C., who was an under-lessee of his wife (o), and covenanted that he would grant him another lease of the premises, to commence after the expiration of the subsisting term, and to continue during the time he had any right, &c. and died before he had made such lease. Afterwards a question arose between an assignee of all C.'s interest and A., who survived her husband, whether the property was changed by this covenant? On the side of the wife it was contended, that the covenant was only a bare agreement between the parties, and rested in covenant, which could only charge the executors and administrators of the covenantor, and that she claimed in neither of those capacities, but by virtue of that right which she had paramount to that of her husband; but on the other side it was insisted, that the covenant was a good disposition of this term in equity, and that it was not prayed that the wife should be obliged to carry it into execution, but that the court would declare it to be a good disposition of the

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Covenant by husband to convey wife's term binding on him in equity.

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(o) *Stead v. Cragh*, 9 Mod. 42.

on the wife, for that the trust of a term was of the same nature as the term itself, et per Lord Keeper, "I should not doubt if a *feme* have the trust of a term for years, and marrieth, but to decree it to the alienee of the husband, (sed quære [by the reporter] if to the alienee; but it seems it must be to execute the decree to the husband, and then the husband may alien; but the Lord Keeper said as before.) When a term is settled for the maintenance and jointure of the wife, the husband shall bind the wife by his alienation." In *Saunders v. Page*, 3 Ch. Rep. 293, *Sir Edward Turner's case* was cited and approved; and notwithstanding Lord Alvanley's doubt in *Macaulay v. Phillips*, 4 Ves. 19, whether the husband can assign the wife's interest without valuable consideration, it seems to be now generally understood as settled law, that a trust term of the wife will be wholly under the husband's power. See 1 Rep. Bar. & Fem. 174. 1 Pres. Abs. 344. and 3 Thos. Co. Litt. 306. Cham. on Lea, 350. infra, 797. et seq., and *Packer v. Windham*, Pr. Ch. 419, where it was said by Lord Chancellor Cowper, that the bond, &c. was a chose in action, and not assignable at law, but a term for years was only a chattel real, which the husband might assign by law without his wife, and so he might the trust of such a term, and consequently the money secured by it.—There is, however, this distinction, which was taken and acknowledged both in *Sir Edward Turner's case* and in *Bullock v. Knight*, ubi supra, that if a term be assigned in trust for the *feme* before marriage, with the privity and consent of her intended husband, there the husband cannot intermeddle or dispose of the term. If, therefore, a term be settled by the husband on trusts for the separate use of his intended wife, no other mode of mortgaging or assigning the term will be effectual than a *fac sur concesserat*, in which the wife concurs. But the term thus settled upon trusts for the separate use of the wife must, to be exempt from the husband's controul after marriage, proceed from the husband himself, or be settled with his privity before marriage, as will appear by the case of *Tudor v. Samyne*, cited by the learned author, postea, 751.

term in equity. And so it was decreed to be, because the husband had a power to dispose of it; and the covenant was such a lien as bound the right, in whose hands soever it went (N).

Trust of term and trust of money raiseable by term, equally within husband's power.

And there seems to be no difference in this respect between the case of a term for years in trust for a woman, and a term for years in trust to raise money for the benefit of a woman created before marriage. Thus where A. made a settlement, whereby he created a term for years in trust to raise 400*l.* a piece for his two daughters (p); one of them married B., and he and his wife brought a bill, and had a decree to have the 400*l.* raised and paid. But before it was raised, B. assigned the benefit of this decree in trust for the payment of his debts, and made him executor and died, leaving his wife and a child unprovided. The creditors filed a bill to have the benefit of this assignment; and though it was insisted, on the behalf of the wife, that there was a difference between a term in trust to raise a sum of money for a woman, and a trust of the term itself for a woman; yet the Master of the Rolls held that this was a term for years, *and not a sum of money*, and therefore not to be distinguished from *Sir Edward Turner's* case. And he said he must decree it (though against his conscience), that there might be an uniformity of judgments.

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So money secured to a woman on mortgage of a term for years, or raised by sale of the wife's term in trustees, becomes, on payment, the husband's (q).

Husband no power over wife's trust of term, created with his privity.

But it is said to have been agreed in *Sir Edward Turner's* case (r), that where a term is assigned in trust for a *feme covert* by the *privity and consent* of her husband, there, without doubt, the husband cannot intermeddle or dispose of it. Accordingly where a *feme sole*, being possessed of a brewhouse for a term of years (s), mortgaged it, and afterwards, a day or two *before* her marriage, with the privity of her intended husband, as ap-

(p) *Waller v. Saunders*, 1 Eq. Ca. Abr. 58. et vide S. L. Gilb. Eq. Ca. 102.

(q) Hob. 3. March. 54. 55. *Parker v. Wyndham*, Gilb. Rep. Eq. 98, 102.

[S. C. Pre. Ch. 419, and postea, 771. —Ed.]

(r) 1 Vern. 7. 11 Ch. Ca. 266.

(s) *Draper's case*, 2 Freem. 29. Sed vide contra, 1 Rol. Abr. 343. F. 5. 7.

Agreement by tenant for life to grant lease, binding on remainder-man, when.

(N) See also for similar law, *Bates v. Danby*, postea, 797, and *Shannon v. Brudshaw*, 1 Sch. & Lef. 52, where it was decided, that although a tenant for life, with a leasing power, do not actually grant a lease, yet if he enter into an agreement to do so, it will bind the person in remainder. On the same principle, it is presumed the case of *St. Paul v. Dudley*, 15 Ves. 167, 173, was decided.

peared by his being a witness to the deed, made an assignment of her interest to trustees, in trust for herself for life, and then for her son by a former husband ; and afterwards married, and her husband took an assignment from the mortgagee, and then surrendered his lease to the reversioner, and took a new lease for the same term, and died. The question was, whether the husband, in this case, had power to dispose of the interest of the wife in this term for years, it being settled with the husband's privity ? And it was held *clearly per curiam*, and admitted by both parties, that if a *feme covert*, with the privity of the husband before marriage, doth convey a term for years in trust for herself, that is clearly out of the husband's power, and he can neither dispose of nor release the interest of his wife ; and if the wife should join in the grant, it would not mend the case.

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We may observe, that in the last case the husband was a witness to the deed ; and the Lord Chancellor, in the case of *Pitt v. Hunt*, seemed to think it necessary that the husband should be a party to the deed ; for his Lordship, reprobating the resolution in *Sir Edward Turner's case*, said he thought from thenceforth it would not serve turn to have the husband's consent or privity to an assignment of a term in trust, unless he was likewise made a party to the assignment.

He must be party to deed. Semb.

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And in *Draper's case* the court seemed to incline to the opinion, that if a *feme* doth secretly, without the knowledge of her husband, before marriage, convey a term for years in trust for herself, that this shall be in the power of her husband, so

Secret assignment of term by wife on eve of marriage in trust for herself, void against husband (o).

(O) In *Howard v. Hooker*, 2 Ch. Rep. 84, a widow, in contemplation of a second marriage, made a deed of her former husband's estate (to which she was entitled under a settlement thereof for her benefit), and married, without informing her second husband of the disposition she had made of her property. The husband filed a bill to have this deed set aside as a fraud upon him, and it was decreed that the deed should be absolutely set aside, and no use made of it either against the said second husband, or any claiming under him.—That a secret conveyance by a feme sole of her property to a stranger, on the eve of marriage, without the knowledge of her intended husband, will be deemed a fraud, see *Lance v. Norman*, 2 Ch. Rep. 41. 79, 2d edition. *Blanchett v. Foster*, 2 Ves. 264. *Cotton v. King*, 2 P. Wms. 360. *Poulson v. Wellington*, *ibid.* 535. *Carleton v. Dorset*, 2 Vern. 17. *Ball v. Montgomery*, 2 Ves. jun. 191. 194. S. C. 4 Bro. C. C. 339, and *postea*, 782. But though if a woman, on the eve of marriage secretly convey her property, without the privity of her intended husband, it will be considered as a fraud ; yet, in a case where the deed had been made in contemplation of a marriage with another person, and with the consent of that person, it was held to be unimpeachable. *Strathmore v. Bowes*, 2 Bro. C. C. 345 ; decree affirmed in the House of Lords, 3d March, 1789, S. C. 1 Ves. jun. 28, contra *Edmonds v. Dennington*, mentioned in *Carleton v. Earl of Dorset*, 2 Vern. 17. The intended husband's interest in his wife's property before marriage, is founded upon the good faith which ought to subsist inviolable in relation to so solemn a contract as that of

Disposition by wife before marriage of her estate without husband's privity, a fraud on him, and void.

he may either grant or release the estate of the wife (*t*). And though the estate at law was wholly in the mortgagee, and the wife conveyed nothing but an equity in trust; yet, when the mortgagee assigned over to the husband, the husband had it under the same equity as the mortgagee had, and was just in his place, and no act of the husband could bar the trustees for the wife and her children of their equity. And it was decreed, that this new lease should be assigned over to the wife or her trustees, paying to the executor of the husband the mortgage-money.

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Voluntary assignment.

But if a term be assigned by the husband after marriage to trustees, in trust for the wife, this is voluntary, and fraudulent against purchasers (*u*).

(*t*) Et vide 2 Vea. jun. 194.

Lanc. 54, 55. [S. C. Jenk. 190. Ca.

(*u*) 1 Ch. Ca. 225. *Wike's case*,

92. Hard. 466.—Ed.]

marriage. "In strictness," says Mr. Roper, "the husband can have no right to any of his wife's property previously to the solemnisation of the marriage. Before marriage, therefore, the wife is at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her, with a view to their union. But deception will be inferred, if after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence. The injury he would sustain, if such a transaction were to be sanctioned, is obvious; for since the wife's apparent fortune, in addition to his own, may be a weighty consideration and inducement for entering into the contract, the happiness of both might be endangered, if, after the treaty began under such calculations and persuasions, the wife should be enabled, prior to the marriage, to disappoint them by disposing of or abridging her interest in the property that belonged to her. It is presumed, therefore, that without the consent of the intended husband, the law will not permit any disposition of the wife's fortune to be made before the marriage then in contemplation; and that under no circumstances after a treaty for a marriage has commenced, will any such voluntary disposition of her property be binding upon her subsequent husband. In the absence of other instances of fraud, the time when the disposition or settlement was made must decide its validity, and attention to this circumstance will, as it is presumed, reconcile the principal cases." See 1 Rop. Bar. & Fem. 160. In the *Countess of Strathmore v. Bowes*, ubi supra, Lord Thurlow expressed the rule in these words, "A conveyance by a wife, whatsoever may be the circumstances, even a moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, (though good *prima facie*) because affected with *that fraud*." Et vide further, Ath. Set. 320.

Intended husband should be party to, or have notice of settlement.

From this note we see the necessity of making the intended husband a party to the marriage settlement, when the wife's property is the subject of limitation; and this should never be omitted, or at least it should never be omitted to give the intended husband notice of the settlement before the solemnization of the marriage. See *Blyth's case*, 2 Freem. 97, and *Newstead v. Searle*, 1 Atk. 264. And where he is actually a party to such settlement, a court of equity will not avoid it, although he may have been an infant at the time it was made. *Slocombe v. Glabb*, 2 Bro. C. C. 545.

And it seems that an assignment of a term, held in trust for a *feme covert* by her husband, to a purchaser for a valuable consideration, will be binding upon her and her trustee, and that such assignee is entitled to a decree for an assignment of the legal estate to him, and that without making any settlement on the wife. Thus where A., the first husband of B., being possessed for the residue of a term of thirty-one years (x), conveyed it over to trustees for the separate use and benefit of his wife, and she married C., a second husband, who first mortgaged the term to D., and then sold it to E. A bill was filed against the wife and her trustees to compel them to assign over the legal estate, and so it was decreed; for it was said, as the husband may dispose of a term for years, where the legal estate was in his wife, so he may of the trust of a term, without the wife or the trustees joining. It was objected, that the husband, in this case, had made no settlement or provision for the wife; and that if he was plaintiff, the court would not decree the trustees to assign to him, without making some settlement on the wife; and the plaintiff who derived under the husband, could not be in a better condition—*sed non allocatur*.

Term assigned by former husband in trust for widow's separate use, assignee of second husband may compel assignment of legal estate (P).

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And the latter objection seems, in the case of *Pitt v. Hunt* (y), to have been considered as entitled to no weight in such case, even in respect of general creditors claiming such term.

(x) *Tudor v. Samyne*, 2 Vern. 270. Abr. 58. [S. C. supra, 747.—Ed.]
Et vide *Walter v. Saunders*, 1 Eq. Ca. (y) Vide supra, 744, 5.

(P) See supra, p. 743. 745, in *notis*. The point, whether the equity of the wife can be barred, or affected by the husband's assignment for a valuable consideration, was once much questioned, but Lord Northington, in *Salisbury v. Newton*, 1 Eden 370, held, she was entitled to a provision in such case; and Sir Lloyd Kenyon, M. R. said, the more he thought upon the subject, the more he was satisfied that such an assignee must be subject to the same equity. *Roberts v. Roberts*, 2 Cox 422. Lord Alvanley admitted, that Lords Hardwicke and Thurlow intimated difficulties, whether an assignment for a valuable consideration might not support the right of the assignee, or at least evade this equity; but he observed, "I have looked into almost every case, and have never seen it determined that any such equity does exist in favour of the assignee." Like *v. Beresford*, 3 Ves. 511, 512, and see *Pryor v. Hill*, 4 Bro. C. C. 139. *Pope v. Crashaw*, *ibid.* 326. *Worrall v. Marlar*, 1 Cox 158, and *Bushnan v. Pell*, 1 P. Wms. 459, n. Sir William Grant seems to have thought there were some cases very difficult to reconcile with Lord Alvanley's proposition, for that there was hardly any other ground upon which Lord Hardwicke proceeded in some of the cases. In the instance before his Honour, an assignment by a husband of dividends of stock, in right of his wife, to the amount of 100*l.* a-year, out of 260*l.* per ann. was held good, though a doubt was expressed, what would have been the effect, if the whole of the stock had been assigned. *Wright v. Morley*, 11 Ves. 12, and see for Lord Hardwicke's cases, *Grey v. Kentish*, 1 Atk. 280. S. C. 2 Dick. 494, and postea, 793. *Bates v. Danby*, 2 Atk. 208, and see also *Carteret v. Pascal*, 3 P. Wms. 199, before Lord King.

What equities of wife husband may assign.

Mortgage of wife's estate void by husband's death, made good by subsequent acts of widow.

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Although, during coverture, any alienation of the wife's estate of inheritance, either by the wife alone, or by the husband and wife, without a fine levied thereof, be void after his death; yet a wife may, by any acts done by her which amount in law to a new grant or a re-execution, give it a validity. Thus where a mortgage, in the form of a lease, had been granted of a *feme covert's* estate by the husband and wife (x), and after the husband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a number of years; the Court of King's Bench were all of opinion, that the conveyance in this case, though in the form of a lease, was in substance a mortgage; and not being within the reason for which leases by a *feme covert* were held to be only voidable, was absolutely void on the death of the husband; but that the acts done by the widow, the deed being in the possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant (q).

(z) *Goodright v. Strathan*, 1 Doug. Rep. 58, n. (17). *S. C.* Cowp. 201. et vide *Doe v. Weller*, 7 T. R. 478. Perk. sec. 154. *Drybutter v. Bartho-*

lomeo, 2 P. Wms. 127, supra, 735. Et vide 1 Ch. Ca. 255. *Archer v. Pope*, 2 Ves. 523. Dyer 916, pl. 13, contra as to a lease.

Goodright v. Strathan and Drybutter v. Bartholomew compared and distinguished.

(Q) This judgment is said to be founded on Co. Litt. 36 a. 2 Roll's Abr. and Perkins. See 1 Ves. jun. 31. The following passage from Perkins, sect. 154, was cited by Lord Mansfield:—"If a married woman deliver a bond unto me, or other writing, as her deed, this delivery is merely void; and therefore, if after the death of her husband, she being sole, deliver the same deed again unto me as her deed, the second delivery is good and effectual."—The simple question then was, whether the acts done amounted to a second delivery of the mortgage deed? It appeared in evidence that after the death of the husband, the wife, by three different papers under her hand, had acknowledged the mortgage, which papers were exhibited in court, and much relied on as a confirmation of the deed in question. "Delivery," remarked the Noble Lord, who pronounced the unanimous opinion of the court, "is a matter in *pais* only. The mortgage deed is in the hands of the mortgagee: the wife, after the death of her husband, the mortgagor, surrenders possession, under her own hand, to Saunders and Smith, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms." This, Lord Mansfield thought, was a clear acknowledgment by the wife, that the deed was her's, and that she was content the defendants should enjoy according to the terms of the deed. Therefore, added his Lordship, "we are all of opinion for the defendants, that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed."—The obvious objection to this judgment is, that it appears to be in direct opposition to the well known rule of law that a deed, which is void (as distinguished from a voidable deed merely) cannot be made good by confirmation, and here the Court of King's Bench first declares the mortgage to be void, and then holds it confirmed by re-delivery. Lord Hardwicke has said, that if an obligation be void at law, no new agreement can make it better; the original corruption will affect it throughout. *Chesterfield v.*

If a *feme covert* join in levying a fine to secure a mortgage on her estate, which mortgage afterwards becomes forfeited; *Wife's estate mortgaged by fine, husband pays off part*

Jamex, 1 Aik. 354. And it is observable, that in the prior case of *Drybutter v. Bartholomew*, 2 P. Wms. 127. S. C. antea, 705, of this edition, in the text, receipt of profits and payment of interest by the widow, were not allowed to confirm the title of the mortgagee. By reference to that case we find, that the husband, in right of his wife, was seised in fee of a share of the New River Water, and they joined in a mortgage for 1000 years, by deed without fine, reserving a pepper-corn rent. The husband died, and then the widow received the profits, and paid the interest. The mortgagee filed a bill to foreclose, and insisted that payment of interest by the widow confirmed the lease. But the Master of the Rolls dismissed the bill, admitting, that if a rent had been reserved, the acceptance of it would have confirmed the lease. Between these cases this shade of difference may be drawn, that in *Goodright v. Strathan*, the lease, during coverture, was delivered as an escrow, or rather that it was merely prepared during coverture, and duly executed by the wife, when sole; whereas in *Drybutter v. Bartholomew*, it did not strike the court that there were sufficient acts after marriage to warrant it in saying that the lease had been virtually re-delivered, but if acceptance of rent be equivalent to a re-delivery of the deed, certainly payment of interest must be taken to be equivalent to a re-delivery also.

The court, it is submitted, has considerably embarrassed the doctrine by placing the case cited in the text on a wrong ground. Instead of declaring the deed void, which it certainly was not, it might have said, that it was voidable only, and that the facts proved, amounted to a confirmation. Delivery is of the essence of a deed, and if that could be proved *abundè*, a wide door would be open to fraud and perjury. The cases of *Drybutter v. Bartholomew*, and *Goodright v. Strathan*, are clearly contradictory authorities. The question then arises, which is now to be considered the binding adjudication. It is no reconciliation to say that one case was decided at law, and the other in equity, for then the parties may sue at law or in equity, as their wishes preponderate. This question will be best answered by adverting to the distinctions taken in the books between void and voidable leases; and as a preliminary and leading remark, it should be kept in view that void leases do not admit of confirmation. 1 Pres. Abs. 337. Leases by husbands and wives are of two kinds, the first, those which are made at common law, and the second, those which are made under the statute 32 Hen. 8. c. 28. The former species of lease is the subject to which our present observations will be confined.

Being contradictory, which to be preferred?

Leases by *parol* of the wife's freehold estate, made by the husband, are leases at common law, and are good only during the life of the husband; and after his death, they are void *ab initio*, against the wife, and those claiming under her. *Walsall v. Heath*, Cro. Eliz. 656. To make these leases capable of enduring beyond the coverture, or the life of the husband, they must be in writing, and then they are voidable only against the wife and her heirs. Bac. Abr. tit. *Lease*, (C). The reservation of rent, or the concurrence of the wife during the coverture, will be immaterial so long as it remains at the common law, for, as she has no present right to contract it cannot deprive her of what she does not possess; and it has no tendency to bar her of a right, which may accrue to her in case she survives her husband. If the lease be made by indenture, or deed poll, the law will allow her to affirm or avoid it, as she finds it most subservient to her own interest; if she choose to avoid it, it will be absolutely void, so that she may plead "*non demisit*," because no interest passed from her, and the lessee will be in merely by her husband's contract. The same power of election will descend to her heir or issue by a former marriage, as matter of privity; but if the husband be entitled to be tenant by the curtesy, the issue cannot avoid it during the life-time of the husband. Bro. tit. *Accept*, 6. 10, tit. *Lease*, 24. *Jordan v. Wilkes*, Cro. Jac. 382. 2 Ander. 42. Co. Litt. 45 b. Plow. 137. *Jackson v. Mordaunt*, Cro. Eliz. 119. Hutt. 102. So if the wife join in such lease for years by indenture, if the same be not made pursuant to the stat. 32 Hen. 8. c. 28, she will be at liberty, after her husband's death, either to affirm it by acceptance of rent, or to dissent to or avoid it, by bringing an action of trespass against the tenants in the same manner as if she had been no party thereto; for her joining during the cover-

Void and voidable leases distinguished.

of money,
estate liable to
like sum bor-
rowed (xx).

she will not only be liable to the payment of the original sum borrowed, but if part of that sum be paid off, and then a like sum taken up, that debt will also attach upon the estate.

(xx) [So if the whole money were paid off by the husband, and afterwards another sum of equal amount borrowed and charged on the wife's estate by the husband alone, such charge, it is apprehended, would be binding on the wife, without her

concurrence; and see *Aspley v. Tankerville*, cited *infra*, p. 755-6. Hence, it should seem that the concurrence of the wife in an assignment of the mortgage, with which by fine she has incumbered her estate, will not be necessary.—Ed.]

ture, when she was not *sui juris*, but under the power of her husband, will not bind her after his death; *Wilson v. Riche*, Yelv. 1, et vide Roll's Abr. 350. Cro. Jac. 563. 617. Cro. Car. 165. Cro. Eliz. 769. It is also a principle universally acknowledged, that acceptance of rent by the widow will affirm a voidable lease, see Bac. Abr. tit. *Lease*, (C), and that a feme covert, though not bound by her agreement during coverture, yet acting according to the agreement when a widow, will be bound by it. *Maynard v. Moseley*, 1 Ch. Ca. 253. *Pawlett v. Delaval*, 2 Ves. 662. *Milnes v. Busk*, 2 Ves. jun. 488. *Whistler v. Newman*, 4 ib. 129; see also *Sparling v. Rochfort*, 8 ib. 175. *Chesslyn v. Smith*, ib. 183. *Nantes v. Corrock*, 9 ib. 188. *Jones v. Harris*, ib. 486. 497. *Wagstaff v. Smith*, ib. 520, and *Richards v. Chambers*, 10 ib. 580.

*Lease by tenant
for life void at
his death.*

But a lease by a tenant for life is absolutely void at his death, and will admit of no confirmation. Thus, in *Doe v. Archer*, a tenant for life leased the premises in question for twenty-one years, and before the expiration of that term died, the trustees of the remainder-man, who was then an infant, continued to receive the rent reserved, and the remainder-man himself, on coming of age, sold the premises by auction; in the conditions of sale, the premises were declared to be subject to the lease, and in the conveyance to the purchaser, the premises were referred to as in the possession of the lessee; and in the covenant against incumbrances, the lease was excepted. The purchaser made a mortgage, and in the mortgage deed the like notice was taken of the lease, and the mortgagees for some time received the rent reserved. Notwithstanding this uniform acknowledgment of the lease by all the parties, it was held that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. 1 Bos. & Pull. 531.

*Reasons for
supporting case
in text.*

These particulars being premised, we proceed to apply them to the conflicting cases under consideration. In *Goodright v. Strathan*, the husband and wife make a mortgage for years, without fine or other assurance on record, whereby the estate of the mortgagee was rendered voidable only and not void, and as such capable of being confirmed by the wife surviving, which we find she does by three separate acknowledgments under her own hand. It is obvious, therefore, that the determination in this case can be referred to a substantial basis, without resorting to the remote and inapplicable argument from Perkins. And if it be true, as stated by the counsel, *argo*, in *Clinton v. Hooper*, 1 Ves. jun. 177, that the principle of *Goodright v. Strathan*, has always been much doubted, it is submitted that on an attentive review of the case, that doubt will prove to be without foundation.

*Decree in Dry-
butter v. Bar-
tholomew
doubted.*

On the other hand, many reasons present themselves for seriously suspecting the accuracy of the decision in *Drybutter v. Bartholomew*. That case turned on the non-acceptance of rent. The Master of the Rolls admitting that if rent had been received, the acceptance of it would have confirmed the mortgage; but a mere nominal pepper corn being made payable, which had never been received, his Honour declared that the lease expired with the death of the husband, notwithstanding the subsequent payment of interest by the widow. The reasons for questioning this decree are these:—In the first place, the wife having joined in the lease, it was not void, but voidable merely;—secondly, the law would have been the same, whether any rent had been reserved or not;—and, lastly, the same reason which would have made the acceptance of rent a confirmation, applies equally to the fact of the payment of interest; for as the widow

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Thus, where baron and feme, having occasion to raise 400*l.* (a), levied a fine of the wife's land, and made a mortgage for the same; and after the mortgage was *forfeited*, the husband paid in part of the mortgage-money, and then borrowed as much money more of the mortgagee as he had paid in before: it was decreed, [by Finch, Chancellor,] that the mortgagee, having the estate at law in him by the forfeiture of the mortgage, should hold the land against the heir of the wife until the whole money was paid; and that if the heir would not pay in the whole, principal, interest, and costs, he should be foreclosed.—But in another report of this case, it is said, that the first money paid off, *viz.* the 200*l.* (b), was indorsed on the mortgage-deed, and that the wife, in presence of the husband, made account of what was due on the first and second loan, both being, by agreement, lent on security of the mortgage (R).

(a) *Reason v. Sacheverell*, 1 Vern. 41.

(b) 2 Ch. Ca. 98.

was not liable to the debt; yet if she paid the interest of it, that circumstance must be considered as an acknowledgment of the debt affecting her estate, and consequently as a confirmation of its accessory, the charge and security, and the adoption of them as her own. See also 1 Rep. Bar. & Fem. 138, for a similar view of the case.

It is conceived, therefore, that notwithstanding the case of *Drybutter v. Bartholomew*, payment of interest by the widow upon a debt charged on her estate by her husband, would be considered as a confirmation of the security, provided the mortgage be for years; and if the mortgage be in fee, no substantial argument occurs for a different statement of the rule. The authorities seem to concur in allowing the husband a power to transfer the whole estate of inheritance of his wife, subject only, at this day, to the right of entry of the wife, or her heirs; for even when he discontinues the estate of his wife, the injury may be redressed, and the estate re-vested by entry of the wife, or of her heirs. In the mean time the estate of the wife will be in the alienage of the husband; for the statute of 32 Hen. 8. c. 28. s. 6, did not restrain the extent of the power of alienation by the husband; it merely changed the remedy from an action to an entry. According to some authorities, indeed, a grant by him alone, not creating a discontinuance, will determine on his death, and unless he be entitled to be tenant by the curtesy of England, even on the death of his wife. But there are other authorities which treat the alienation of the husband alone as voidable only, and not void, so that the wife or her heirs must enter to defeat the estate which he had granted; which latter authorities have the greater share of credit at this day. See 1 Pres. Abs. 335. Supposing then the husband's alienation to pass his wife's inheritance, subject merely to her disaffirmance of the grant when discoverd, the mortgage in fee as against the wife and her heirs, will be voidable only, and as such capable of confirmation by the same means as have been suggested will confirm a mortgage for years. The preceding observations are addressed principally to the case where the wife joins in the mortgage during coverture; but supposing the mortgage of her estate to be made by the husband alone, the same remarks will, it is apprehended, be equally suitable.

Widow confirms mortgage of her estate by paying interest.

(R) By Reg. Lib. 1681, B. fol. 409, it appears that an indorsement was made on the mortgagee deed, and subscribed by baron and feme, whereby they agreed that the land should stand charged with the money; and that the wife, with the consent of the husband and other parties interested,

Wife's estate not liable beyond sum originally borrowed.

But no case has yet occurred in which it has been determined, that where the husband and wife join in a mortgage of her estate, that he shall by his own indorsement charge the estate beyond the sum originally borrowed (s).

Wife mortgages her estate for husband's use, his personal estate first liable to mortgage.

But if the money borrowed on mortgage of the wife's land be for her husband's use (c), his personal estate shall be first applied in discharge thereof; for the mortgage *being originally the debt of the husband*, his personal estate is the primary fund to pay it; and the wife, by consenting to charge her lands with it, does not make it less the husband's debt than it was before.

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Though it be bequeathed to a charity.

Thus, where a husband, seised in right of his wife, borrowed 500*l.* to supply *his* occasions (d); for securing which, he and his wife levied a fine of her inheritance, and raised a term of 500 years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed with interest; in the deed, the husband covenanted to pay it off. Afterwards the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former discharged out of her husband's personal estate. And so it was decreed; for his personal estate would be liable to pay debts, before legacies, though left to a charity, they being still but legacies (T).

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(c) 1 Ves. jun. 186, 7.

(d) *Tate v. Austin*, 1 P. Wms. 264. S. C. 2 Vern. 639, et vide *Pocock v. Lee*, 2 Vern. 604. *Parteriche v. Pawlet*, 2 Atk. 384. Amb. Rep. 150, in-

fra, 756. *Asley v. Earl of Tankerville*, 3 Bro. C. C. 545, and *Baggot v. Oughton*, 1 P. Wms. 347. [S. C. postea, 929, and S. P. *Inledon v. Northcote*, 3 Atk. 436.—Ed.]

† Part of this page has been transferred to p. 732, of this edit. postea.

made a will, and devised the lands in question to her daughter and her heirs, to be sold for the payment of her debts, and the plaintiff's debt in particular. See Mr. Raithby's edition of Vern. vol. i. p. 41, n. (1).

(S) And on principle, it is conceived that no case can occur in which it shall be held, that the husband has a right to charge his wife's estate beyond the sum originally lent.

Wife's right of exoneration similar to that of heir.

(T) This case was affirmed in Dom. Proc. 1 Bro. P. C. 1. The material parts of the decree are fully stated by Mr. Cox, in his note to 1 P. Wms. 264, et vide *Pawlet v. Delaval*, 2 Ves. 663, 669. In this latter case Lord Hardwicke said, there were several instances where wives had concurred to pledge part of their separate property for a debt of their husband's, and the court never said that the security should not take place, but had held it to stand as a pledge—the husband nevertheless to exonerate.—The rule is, that the title of the wife to exoneration is precisely similar to that of the heir. Thus, in the case cited in the text, though it was not the question in the cause, and consequently the judgment of the court did not

So where A., and B. his wife, made a mortgage of the wife's estate, and the husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the

Husband's covenant to pay money, exonerates wife's estate,

appear to have been weighed in argument, yet the court declared, that clearly the wife could not insist upon being paid against onerous creditors, but should be postponed to such creditors; and that the debt, being originally the debt of the husband, his personal assets were bound to pay it in the first instance, the wife being entitled to have her estate so exonerated, not upon any right she might have, but upon the idea of its being the husband's debt; et vide 3 Bro. C. C. 211. But since the *heir* claims the estate from the ancestor who contracted the debt, and the wife claims her estate by a paramount title, and not under her husband, and therefore not liable to any of his debts, the liability of the one to payment of the ancestor's debts, and the exemption of the other from the discharge of any of them can be readily comprehended. Thus, in the case of the *heir*;—if the mortgagee were paid his debt out of the ancestor's personal estate, and that fund were insufficient to pay the other debts, the unsatisfied creditors might recover out of the real estate in mortgage what had been taken by the mortgagee from the personal funds, by being permitted to stand in the mortgagee's place, and to make use of his security; the *real* as well as the *personal* estates having been the property of the deceased ancestor, the debtor; see *antea*, 343, of this edit. and *postea*, 903. But in the case of the *wife*;—as the estate in mortgage for the husband's debt was not *his*, but *her* property, and therefore not liable to his debts, this circuit cannot take place; and accordingly Lord Hardwicke, in *Robinson v. Gee*, 1 Ves. jun. 252, in allusion to this point, expressed himself thus:—"It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband: after his death, she is entitled to have her real estate exonerated out of his personal and *real* assets, the court considering her estate only as a *surety* for his debt, and none of *his* creditors have a right to stand in the place of the mortgagee to come round on the wife's estate." On this principle also arises the difference between the *heir* and the *wife*, in respect of general legatees—the wife's right to exoneration is preferred to the right of general legatees, to be paid out of the residue of the assets; whereas legatees, as well as creditors, are permitted, as against the *heir*, to stand in the mortgagee's place." See also Bunb. 137. *Lutkins v. Leigh*, Forr. 53, and *Rider v. Wager*, 3 P. Wms. 399. 335.

It is also observable, that the wife's right of exoneration will continue, although the original debt be discharged by the husband, if he borrow another sum on the same security; and it is necessary also to remark, that the husband cannot by any direction in his will, ordering his personal estate to be applied in payment of his debts, except mortgage debts, exempt the application of that fund from the exoneration of his wife's estate. Thus, in *Asley v. Tankerville*, 3 Bro. C. C. 545, the wife's estate being in strict settlement, with the ultimate limitation to her and her husband in fee, with a power for them to revoke the old, and appoint new uses, they mortgaged the premises for 500 years to secure 3000*l.* with a reservation of the equity of redemption to the husband, or such other persons to whom the freehold and inheritance should belong. The mortgage having been paid off, the term was assigned by deed in trust for such uses as the husband should appoint; and in default, to attend the inheritance; but the wife was not a party to the deed. The husband afterwards borrowed 3000*l.* upon security of the estate, and by his appointment, the term was assigned for the benefit of the mortgagee, and the husband covenanted for payment of the money. He then made his will, and ordered that his personal estate, not otherwise disposed of, should be applied in payment of his funeral expences, debts, and legacies, except such debts as were secured upon and might affect any of his estates in A., &c. whereof he was not seised in fee-simple (meaning the wife's estate in mortgage). Lord Thurlow was of opinion, that the 3000*l.* was the husband's debt, and that his assets should exonerate the wife's estate; his Lordship therefore dismissed the bill which was filed to subject her estate to the payment of the debt, but without costs.

And continues, though debt be discharged by husband, if he borrow another sum on same security.

Husband cannot exempt his personal estate from wife's right of exoneration.

husband died, having made his executor (e). And the question was, whether the mortgage-money should stand charged upon the land, or the land be exonerated out of the husband's personal estate? *Et per curiam*, the husband *having had the money*, is in equity the debtor, and the land is to be considered but as an additional security (v).

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except there be
settlement.

But if there be a settlement made either before or after marriage (g), and then such mortgage or security, the husband will not be answerable to the wife's estate for the money borrowed (x).

Or it be wife's
debt contracted
dum sola (y).

So if the money borrowed were to pay off a debt due from the wife *dum sola*, the husband's assets would not be liable.

(e) *Pocock v. Lee*, 2 Vern. 604, 903, *in notis. Heron v. Newton*, 9 Mod. [supra, 755. And see as to the effect of husband's covenant in a similar case, *Earl of Oxford v. Lady Rodney*, 14 Ves. 417. S. C. postea, 12, and postea, 940.—Ed.]
(g) *Lewis v. Nangle*, Amb. 150. 2 P. Wms. 664, n. (1). [S. C. 1 Cox 240, et infra, 938.—Ed.]

No exoneration
if security can
be connected
with settlement
of estate on
wife's mar-
riage.

(U) The paragraph beginning, "If a wife, &c." and ending, "at the day," which, in the fourth edition of this treatise, was evidently misplaced as following the above passage here, has been transferred to page 732, of this edit. where, it is conceived, it may be more appropriately introduced.

(X) The rule to be deduced from the case cited is, that if from the nature and circumstances of the transaction, it appears, or can be inferred to have been the intention of the parties that the wife's estate should be solely liable to discharge the whole sum borrowed, as in the instance of the mortgage having relation to the settlement of the estate by the agreement of the parties upon the marriage; there, since an inference may be drawn that such agreement extended to the subsequent mortgage, and that it was stipulated that the sum to be borrowed should be charged upon and borne solely by the settled estate, such a case will form an exception to the general rule, and exempt the husband's estate from the wife's general equity. On this principle Mr. Roper suggests, that the cases of *Lewis v. Nangle* and *Kinnoul v. Money*, (which are generally considered as contradictory authorities) may probably be reconciled. See 1 Rep. Bar. & Fem. 146. The cases are cited in the text and notes, postea, p. 938.

Rule inappli-
cable to cases
where wife's
estate is sub-
ject to her an-
cestor's debt, or
money borrow-
ed, is appro-
priated to her
separate use.

(Y) In like manner if the estate descend to the wife charged with the mortgage of her ancestor, the rule entitling the wife to exoneration will not apply. In *Baggot v. Oughton*, 1 P. Wms. 347, land descended to the wife subject to a mortgage; the mortgage was assigned, and the husband covenanted to pay the money to the assignee. It was decided, that as the debt was not the husband's, his personal assets should not exonerate the wife's estate; and the covenant was considered as an additional security only for the satisfaction of the lender of the money. The decision in this case of *Baggot v. Oughton*, is said to have been affirmed in the House of Lords; but the case is not in Brown; and Mr. Sugden has said, that after a diligent search, he has not been able to meet with it amongst the printed cases of that period. See Treas. on Pow. p. 571, 3d edit. It is further observable, that according to Lord Thurlow's opinion, in *Clinton v. Hooper*, 1 Ves. jun. 188, it should seem, that if the money borrowed upon the wife's estate were paid or transferred to her with her husband's privity, so that she might dispose of it as she pleased, and instead of spending she preserved it, and had the power of disposing of it by will as if she were unmarried; then, although the court would not infer an equitable assumption, contrary to the tenor of the obligation subsisting between husband and wife, who cannot contract with each other without the intervention of the trustees; yet, as she had sole control over the money, and it never was the husband's during her life, the principle that the debt was not the husband's would apply, and therefore, would exempt his estate from exonerating the

Nor would it make any difference in these cases that the husband gave bond for the payment of the money and performance of covenants; for although the creditors may sue him upon such bond at law, a court of equity will relieve him, by ordering him to be paid out of the wife's estate, which is the *primary fund* to discharge her debts (*h*).

And it seems not necessary that it should appear upon the face of the deed by which the mortgage is created, for whose use the money was borrowed, that may be proved *aliunde*. Thus, in the case of *Lord Kinnoul v. Money* (*i*), the position is laid down, that parol evidence is admissible to prove that the debt, which the husband contracted to pay, was the debt of another, not his own; consequently that his personal estate was not to be charged in favour of the heir or wife. And Lord Loughborough, Chancellor, in the case of *Clinton v. Hooper* (*k*), is reported to have said, applying his observation to a case put *arguendo* by the Solicitor-General, that if the money raised by a mortgage of the wife's estate were paid to the wife, without writing and with the privity of the husband, and it were made out satisfactorily to the court that she could dispose of it as she pleased, or suppose she kept it herself, so as to be able to make a will, &c. with all the consequential rights of personal estate; he saw no reason, why the court should not, proceeding upon the same principle, declare that the money was not the debt of the husband. It being transferred to her, and so as to be attended with all the equitable consequences of separate estate, it never was his, so the whole obligation upon him would consist in his covenant.

Whether money borrowed for use of husband or wife, proveable by parol.

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But Lord Loughborough, Chancellor, in the case to which allusion is last made, thought that *parol* evidence of a *declaration* of the wife, who had subjected her estate by joining in a mortgage, that it was meant to be a gift to the husband, was not admissible. When it was a transaction purporting, not

But parol evidence of wife's declaration that in joining in mortgage she intended it as a gift to her husband, inadmissible.

(*h*) *Lewis v. Nangle*, Amb. 150. 2 P. Wms. 664, n. (1).

938, vid. et. as to parol evidence, 952.—*Ed.*

(*i*) Cited per Lord Chan. [1 Ves. jun. 186, S. C. 3 Bro. C. C. 211. 2 P. Wms. 664, note, and postea,

(*k*) 1 Ves. jun. 186, 7. S. C. 3 Bro. C. C. 201.

security affecting his wife's estate under the above circumstance: and, that if, by a distinct transfer and independent transaction, without any relation to the original matter, she gave the money to her husband, that circumstance would not probably reach back to the original contract, so as to make the husband the original debtor, and to ground the wife's right to exoneration upon the principle, that payment having been made to the wife was, in the common legal sense, payment to her husband. Et vide 1 Rep. Bar. and Fem. 145, *et seq.*

only by the instruments themselves, but by all the other evidence, except parol evidence, to be a transaction to raise money for the husband, and he therefore bound to pay; his Lordship had great doubts, whether it was possible to apply parol evidence, to that transaction itself, to prove it different. If the evidence were, that the wife's debts were paid by it, or if any application different from paying it to him, his Lordship saw no reason against admitting her parol declaration to that extent. But when he said *that*, he went far beyond all the cases, which were, where the fact was proved, that the money was paid to another account, and never did come to the husband's account, because it never was received by him at all.

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Declaration by wife to husband's executor, that she waives right to exoneration, binding.

And where the wife had a right to be exonerated out of the assets of her husband in respect of money raised by mortgage of her estate (*l*), and received by him, she was held to have barred herself by *telling* the executor that she did not mean to claim this right, and desiring he would proceed in paying the legacies; and parol evidence was admitted of her declaration to this effect.

Exoneration postponed to debts, but preferred to legacies.

It was said in the case of *Tate v. Austin*, that all other debts of the husband should be preferred to the debt due to the wife (*m*), [but it was declared, that the wife's estate should be exonerated out of the husband's personal estate before the payment of legacies given by his will (*mm*)].

Substitution not allowed.

If the wife receives satisfaction out of the personal estate of the husband (*n*), none of his creditors have a right to stand in the place of the mortgagee, as against the real estate of the wife.

Wife not deprived of redemption by vague words in assignment of mortgage.

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Vague words, in a subsequent assignment, importing an assent from the wife, that, on redemption, the estate should be re-assigned in such manner as either the husband or wife should appoint, will not alter the nature of the debt, or carry the estate to the husband.

Thus, where Theophilus Earl of Huntingdon, and the Countess Elizabeth his first wife (*o*), mother of the plaintiff, on the 1st of August, 1682, joined in a mortgage of her inheritance for 4500*l.* to supply his Lordship with money to pay for the place of Captain of the Band of Pensioners, and sub-

(*l*) *Clinton v. Hooper*, 1 Ves. jun. 173.

(*m*) 2 Vern. 689. [et vide 2 Foub. Tr. Eq. 291, 5th edit.—Ed.]

(*mm*) [1 P. Wms. 264.—Ed.]

(*n*) Per Lord Hardwicke, 1 Ves.

252. [et vide supra, 756, in *notis.*—Ed.]

(*o*) *Huntington v. Huntington*, 2 Vern. 437. 1 Eq. Ca. Abr. 62. Ca. 4. 4 Vin. Abr. 69, pl. 9. 10 ib. 345, pl. 17. 1 Bro. Parl. Ca. 1.

ject to the mortgage which was for a term of years, the estate was settled to Countess Elizabeth for life, remainder to the plaintiff her son in tail, with a covenant in the deed by the late Earl to pay the money, and a proviso that, on payment thereof, the term should cease; and on the 5th of the same month, the Earl, by letter, thanked the Countess for having sealed the mortgage, and added, that the profits of the office should be religiously applied to pay off the incumbrances. The mortgage was several times assigned, and particularly in 1683, when the Countess joined in the assignment; and then the proviso was, that, on payment of the money by them, or either of them, the term was to be assigned, *as they, or either of them, should direct or appoint*. When money came in, the Earl paid off the mortgage, and took an assignment thereof in trust for himself; afterwards the Countess died, and he married a second wife, one of the defendants, and he died, having, by will, devised his personal estate, together with the benefit of this mortgage, to a trustee in trust, for younger children, which he had by his second wife. On a bill exhibited by his son by the first wife, claiming, as her heir, to have the mortgage assigned to him, the Lord Keeper Wright refused to make such decree, unless, upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But this was reversed upon appeal to the Lords in Parliament, *and an assignment decreed peremptorily to the plaintiff (z)*.

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Where a *feme covert*, being a jointress (p), created a term for years out of her estate for life, it was held, the reversion, vesting in her, would attract the redemption. Thus, where the defendant, having a jointure of 100*l.* *per annum* out of some houses in London, which were burnt down, joined with her husband in borrowing 1500*l.* to build upon the ground; and, to secure the same, levied a fine *sur concessit* for ninety-nine years, if she lived so long, and a deed was afterwards made between the conusee and the husband, wherein the husband covenanted to re-pay the mortgage-money with interest; and the equity of redemption was limited to the husband and his heirs, but the wife was no party thereto; the husband, having expended 3 or 4000*l.* in building upon this ground, died; and the question was, whether the jointress, or the heir of the husband,

Jointress entitled to redeem, on what principle.

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(p) *Brend v. Brend*, 1 Vern. 213.

(Z) For observations on this case, see postea, 764, in notis.

should redeem? And it was decreed in favour of the former, for that the wife was no party to the deed of re-demise, by which the redemption was limited to the husband, and the wife being a jointress, and having granted a term for years only out of her estate for life, there vested a reversion in her, which naturally attracted the redemption.

If an agreement be requisite (A)?

[764]

Account of bygone profits not decreed, when.

But, in the last case, as reported by the name of *Brond v. Brond*, 2 Ch. Ca. 98, it is stated, that there was an agreement, that she should not be prejudiced, but should redeem, paying the interest of the money borrowed (g); and that the court resolved, that the wife, having suffered the representatives of the husband to remain in possession and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of the bill exhibited, which was the first notice to them of such agreement.

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Wife's mortgage by fine, only a partial alienation of her jointure.

If a wife joins her husband, in a fine of her jointure, in order to a mortgage or security, although there be no agreement that she shall redeem, yet she is not considered in Chancery as absolutely parting with her interest (f); but there results a trust for her, to have her estate again when the incumbrance is paid off, as if it had been a mortgage on condition, and the money paid at the day (B).

(g) *Brond v. Brond*, 2 Ch. Ca. 98.

(f) 2 Ch. Ca. 99, 100. 162. [For the transposition of this paragraph

see note (U), ante, 728, of this edition.—Ed.]

(A) An agreement either express or implied, is absolutely necessary to change the wife's equity, and make the fine operate as an absolute bar to the widow's equity of redemption. See the next note, and 1 Bligh Rep. 118.

The earliest case on this head of law.

(B) The earliest case to be found in the books on this head is that of *Rowell v. Whalley*, 1 Ch. Rep. 218, 2d edit. The facts and decree appear on the report, but the grounds of the judgment are left to conjecture, which however cannot well be mistaken. The case was briefly this,—One S. and Hannah his wife, in consideration of 300*l.*, by deed bargained and sold a messuage and lands in Kent (which on their marriage was settled by the said S. on his wife for her jointure) to W., his heirs and assigns for ever; in which deed the said S. covenanted that he and his wife would make better assurance by fine; and the same deed contained a proviso, that if the said S. and Hannah his wife, or either of them, or their heirs, executors, &c. should pay to the said W. his executors, &c. 348*l.* at the time therein mentioned, then that the said fine should enure to the said S. and Hannah, and the longest liver of them, and after to the right heirs of the said S. for ever: a fine was levied pursuant to this covenant, but the money was not paid at the day. The husband died leaving his wife and an infant son and heir surviving, whereupon the wife filed a bill against the son and W. to redeem and to secure her jointure. W. by his answer stated, that he was willing to assign and convey the premises as the court should direct, without whose direction he could not safely do any act. The other defendant, the son and heir of the mortgagor, being an infant, the court upon hearing his answer

If a woman, entitled to a mortgage, marry, and *thereupon* the husband, in consideration of her fortune, make a settlement

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Husband making settlement on wife, on

by guardian (who acknowledged the settlement on the wife), was satisfied that the estate of W. in the premises was but a mortgage, and that the plaintiff Hannah ought in equity to enjoy the premises during her life, *notwithstanding the fine by her passed as aforesaid*; and decreed, that the plaintiff and the infant should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating the estate for life of the plaintiff in the premises at one-third, and the reversion in fee of the infant at two-thirds.—This case, it will be perceived, involved the question whether the widow was entitled to redeem—in respect of the estate reserved to her by the mortgage deed and fine, or in respect of a resulting trust under her prior title by settlement. The court shewed, by its decree, that her title to redeem was as tenant for life under the mortgage deed and fine, and that the heir of the husband would be entitled to the estate after her death by virtue of the same instruments. It does not appear by the report whether there was a proviso for redemption detached from the declaration of the uses of the fine; but from the observations of the court it is conceived there was not. Lord Redesdale however has said, that the declaration which follows the covenant to levy the fine, shews that there was a distinct agreement between the parties, defining the course in which the property was to be carried after the satisfaction of the mortgage, and that this agreement was in no manner dependent on the proviso for redemption. The noble Lord expresses himself thus:—"The subsequent declaration and limitation having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate." 1 Bligh Rep. 119.

The next case to be found in the books is that of *Broad v. Broad*, 1 Eq. Ca. Abr. 62, pl. 6. and *ibid.* 316, pl. 8, the case from which the three last paragraphs in the text are taken. In the statement of that case by the learned author, from Vernon's Reports, several important facts which bear strongly on the point under consideration are omitted, as that case is stated in 2 Ch. Ca. 98 and 161, which renders it necessary to run over the leading facts again, as we find them reported in this latter place; according to which it appears that T. B. the husband of the plaintiff in the suit, settled certain houses in Bread Street, London, to the use of himself for life, with remainder to the plaintiff for life for her jointure. These houses were burnt down in the great fire in 1666. In order to rebuild them, the husband borrowed 600*l.*, and a fine *sur concessit* was levied by the husband and wife to the lender for ninety-nine years, who re-demised the premises to the husband for ninety-eight years, rendering 36*l.* per ann.. The husband bound himself to repay the 600*l.* at a time, &c. [the form in which mortgages in that day were usually made.] The husband had agreed with the wife that she should have the redemption, paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself in tail male, with remainder in tail to his brother (the defendant), charged with portions of 3000*l.* for his daughters. The husband died, making his brother his executor. The personal estate was not sufficient to pay his debts. The defendant had executed a bond, upon which he was liable as surety for his deceased brother to the amount of 1600*l.*, which he satisfied, and also paid the interest of the 600*l.* borrowed until 1681, when the plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the plaintiff's title was but a parol agreement between husband and wife; and that he had no notice of the agreement until the filing of the bill. It was decreed by Lord Nottingham, that the plaintiff should have the redemption, *paying a third part of the principal*, but should have no profits received by the defendant until the filing of the bill in 1681, when he first had notice of the agreement. (The decree therefore, which was made on the original hearing, proceeded entirely upon the foundation of the agreement.) A bill of review having been afterwards filed, suggesting, that

Instance, where wife's joining in fine, not deemed an absolute conveyance of her jointure.

marriage treaty of Lord Hereford, with the defendant his lady, they being both infants, an act of parliament was procured for

jure uxoris only, unless intention to give it him alone be recited.

jure uxoris was equitable, so it remains equitable; but still *jure uxoris*: and that equity throws this protection round the wife, that the deed should operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit." [An express recital is not now necessary, though something tantamount to it is, vide *infra*, per Lord Eldon, in *Innes v. Jackson*, Dom. Proc. The noble Lord continued:] "The instrument recites, that the interest was paid up to 1766, but that the principal sums were due; and that the purpose was for better securing the payment of the principal sums, and a higher rate of interest; and for what? For any other purpose? No other purpose. And then it is asked, what was the object of the mortgage? The answer is, that it was for the better securing the payment of the principal, and varying the rate of interest. You may say, that it was for the further purpose of reserving the equity of redemption to the husband. But the question comes back again to this; whether there are any special circumstances to shew that the intention was to go beyond the purpose recited in the deed? Then we have to consider what was the effect of the fine, and with respect to that the same answer may be given. The fine was levied for the same purpose only for which the mortgage was made. If a fine by the husband alone could answer the recited purpose, the circumstance of his wife's joining with him to levy the fine might be evidence of her intention to waive her right. But that is not the case; for the estate being that of the wife, whether the purpose was to vary the rate of interest, or to entitle her husband to the equity of redemption, a fine was necessary; and in neither case could the purpose be effected without her concurrence in an assurance on record. The deed recites, that the purpose is to consolidate the funds and give a higher rate of interest: and there is nothing to shew that the wife meant to give her husband the benefit of her estate beyond this, whether that is sufficient to give the equity of redemption to the husband is the question to be determined."

Grounds of decree that wife barred by fine pro tanto only.

On a future day the Lord Chancellor stated the concurrence of Lord Redesdale in opinion, that the decree ought to be affirmed. And on June 5, 1818, Lord Eldon declared that the decree in the court below was right, in so far as it decided that the heir at law of the wife, whose estate had been mortgaged, was entitled to redeem, although the equity of redemption had been reserved to the husband and his heirs; for that there was no recital, no special circumstance, from which it could be concluded that the real intention was to make a new settlement of the estate—nothing to take it out of the rule that where the husband is seised of the legal estate *jure uxoris*, and husband and wife join in a mortgage of the estate—reserving the equity of redemption to the husband and his heirs, the husband has the equity of redemption as he before had the legal estate, viz. *jure uxoris*; nor any such special circumstances as those in the case of *Innes v. Jackson*, ubi *infra*.—On this declaration the decree was affirmed with some trifling corrections of the record; for which see 6 Dow's Parl. Ca. 21.

Innes v. Jackson. Statement of leading facts.

The next and last case which has involved the question we are now considering, is that of *Innes v. Jackson*, 16 Ves. 356, and 1 Bligh. Parl. Rep. 104. The material facts requisite to a development of that case, are the following:—By a settlement, executed in 1743, certain lands were settled to the use of R. J. (the husband) for life; with remainder to Anne, (his intended wife) for life; with remainder to the children, male and female, of the marriage, in strict settlement; with ultimate remainder to the use of the said Anne, her heirs and assigns, for ever; and the deed contained a proviso, enabling R. J. and Anne, his intended wife, by any deed, &c. to revoke the uses, and to limit or appoint any other uses to any persons, and for any estates. In the year 1745, the husband and wife borrowed the sum of 200*l.*; to secure the re-payment of which, by indenture, dated 25th November, 1745, they demised the said lands to J. Child (as mortgagee), for a term of 1000 years, with a proviso for redemption, by R. J. and Anne his wife, or either of them, their, or other of their heirs, executors, administrators, or assigns, and in case of such redemption, that the term and estate thereby granted should determine. This latter instrument, it is to be observed, could only have effect under the power of revocation contained in

settling a jointure in bar of dower, wherein it was provided, that if she, when of age, did not settle her lands, part of the

the settlement, and it operated merely to create a mortgage term, subject to redemption. R. J. and his wife, having afterwards borrowed of the mortgagee the further sum of 400*l.*, by deed, dated 1st January, 1746, confirmed to him the lands demised for the remainder of the term, discharged from all former provisos, but subject to a proviso for redemption, upon payment by R. J. and his wife, of the sum of 600*l.* with interest, whereupon the term was to be void. By the same deed, R. J. and his wife, covenanted to levy a fine (which was afterwards levied), and it was declared, that such fine should enure to the use of the mortgagee, his heirs, executors, administrators, and assigns, for the remainder of the term, subject to the proviso for redemption thereinbefore contained; and "after the expiration, or other sooner determination of the said term, to the use of R. J. and Anne his wife, for their lives, and the life of the survivor, and after the decease of the survivor, to the use of the heirs of their two bodies, and for default of such issue, to the use of the right heirs of the survivor of R. J. and Anne his wife, for ever." The mortgage was discharged by R. J., who took an assignment of the term to himself. The question was, whether the persons claiming under the wife were entitled to redeem the mortgage, which had been discharged by the husband, and to hold the estate in opposition to the limitations contained in the latter mortgage deeds, or whether the persons deriving title under the husband (who upon the death of his wife and the events which had happened, had acquired the inheritance of the estate under the fine and limitations contained in those instruments), were entitled to the estate? The determination of these claims it is obvious, depended, on the general inquiries, whether, under all the circumstances of the case, a trust of the inheritance in the whole resulted to the wife after payment of the mortgage debt, or whether such trust was repelled by the manner in which the estate was limited in the latter mortgage deeds, after satisfaction of the mortgage.

In the court below, Lord Eldon took the rule to be, that, if the intention is to make a mortgage of the wife's estate, that intention shall govern the parties; and the equity of redemption shall belong to the person, who had the estate before: so as to give back the inheritance to those from whom it came: exactly as when a man makes a mortgage of his own estate; and the proviso for redemption is to him, and the heirs of his body; falling short of the description of persons, who would have taken the inheritance originally, before the mortgage was made. And his Lordship said, that although the deed of 1746 had reserved the equity of redemption to the heirs of the survivor of R. J. and Anne his wife, such reservation would not alter the beneficial interest of the husband or wife. If the husband had the beneficial interest by surviving the wife, or she had the beneficial interest by surviving him, that interest would not have been varied by reserving the equity of redemption to them and their heirs: but, supposing the mortgage to have been paid off, they would have taken the beneficial interest in the same way, as if the mortgage had not been made; and their children's title would have been restored and maintained in equity. To illustrate the distinction (Lord Eldon continued) which had been very ably argued at the bar; take the case of a mortgage of the wife's estate; and the contract may assume various forms upon the face of the instrument: yet, if it operate no more [than as a security for money], a court of Equity will fix the beneficial interest on the person, who would have had it, if the mortgage had not been made. The mortgagee might, under the proviso for redemption, be authorized in making the re-conveyance to the husband and his heirs; and yet that would not exclude the persons, interested in the inheritance. Where the wife's estate is mortgaged, it is of necessity that there should be a covenant to levy a fine; and, whether it is levied, or not, the agreement is, generally, evidence of an intention to do something with the estate. If the object [in *Innes v. Jackson*] was to be collected from the covenant, it was to enure to the husband and wife and their heirs: but his Lordship would not say, that the limitation might not be so expressed as to amount to more, namely, to evidence of an intention to effect a change of the beneficial interest: and the question at last amounted to this; whether, taking the whole transaction together, as connected with the instrument of 1746, any

Lord Eldon's expression and illustration of rule.

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jointure should cease, and nothing was said as to the personal estate; but, upon the treaty, enquiry was made what was her

His opinion and decree that on face of mortgage, nothing more was intended than the mortgagee's security.

thing more was meant, than that it should be a mortgage transaction. It appeared to Lord Eldon, to be no more than a blundering mode of executing a mortgage. The only object of the covenant to levy a fine, appeared to be to secure the mortgage money; and his Lordship asked, could a fine, to be levied at the request of the mortgagee, for his security, have the effect of a revocation of the uses of a settlement, and a declaration of new uses; altering the interests of the wife and family in her estate? Was it apparent on the face of the deed of 1746, that the parties intended to do something more than merely to make a mortgage? The noble and learned Lord thought not; and thereupon decreed in favour of the persons claiming under the wife. See 16 Ves. 371.

That decree reversed in Dom. Proc. Grounds of reversal.

From this decree the persons deriving title under the husband appealed to the House of Lords, 1 Bligh. Parl. Rep. 104; on which occasion, Lord Redesdale went fully into the merits of the case, cited the principal authorities, and in the course of his judgment remarked,—that the proviso for redemption contained in the first deed of mortgage, stipulating, that “if R. J. and Anne his wife, or either of them, their, or either of their heirs, &c. should pay, &c.” was by the second deed of mortgage discharged; and in this latter instrument the proviso was simply, “if R. J. and Anne his wife should pay, that then the said indenture, and the former indenture of mortgage, should be void.” The effect, therefore, of the second deed was to confirm a term of years, which should be redeemable and cease on repayment of the money borrowed, and after such determination of the term, the lands were settled to specified uses. The principle was this:—That in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case, (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage.

General principle.

Lord Redesdale's expression of rule after review of cases.

That rule applicable to cases of dower and jointure.

His Lordship then cited the principal cases, and observed: “It must now be admitted, as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower, out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or, where the words admit of any ambiguity, that there is a resulting trust for the benefit of the husband, according to the circumstances of the case.”

Rule applied to case in question.

But it seemed to Lord Redesdale, in the case before the House, that the operation of the deed of 1746, as to the mortgage term, and the operation of the deed as to the limitation of the fee, were wholly distinct, and in no way dependant on each other. The question did not arise on the interpretation of the proviso for redemption, but it arose upon a distinct and subsequent clause of the deed [respecting the reversion]. The term and the fee were kept distinct in the deed. The term was a security for the repayment of the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which the parties proposed to effect this was, by declaring, that upon payment of the money due, the term should cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating on the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate subject to the term, remained perfectly distinct, and had no connection whatever with the existence of a term which then would have ceased to exist. A court of equity would so deal with the declaration, that although the term became absolute by non-payment of the money at the day, yet it would hold it still subject to redemption. By whom it might be redeemed was to be discovered from the title; which, by the deed itself, was declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. In all the other cases decided upon the general principle, the grounds of decision

portion or fortune, and a particular given in of what her personal estate amounted to, wherein (*inter alia*) mention was made

were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in the case before the House there was no ground to raise such imputations. For the deed was clear and express in its declarations and provisions.

Lord Redesdale continued, "Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage, where it is simply a declaration, that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, the rules which have been established in the cases of resulting trusts, do not in any degree apply, according to the mode in which the settlement of 1746 has been made, there is no connection whatever, in legal operation, between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years." On these grounds, Lord Redesdale conceived that there was no foundation for holding that the mortgage-deed and settlement of 1746, should not have the operation which the words of the deed imported, and he was therefore of opinion, that the decree which had been pronounced was erroneous. He should move simply to reverse the decree, and that the bill should be dismissed.

Lord Eldon then observed, that the circumstances of the case were, certainly, much better understood than they were, and much greater research had been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it then appeared. The judgment of the House would remove a difficulty, which his Lordship knew was floating in the minds of many persons. He conceived it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary that there should be in the recitals of the instrument, some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed, to lead the wife to understand what those limitations were. It appeared, however, on looking into the cases which had been referred to, that such a proposition could not then be supported; and therefore Lord Eldon was of opinion, that the decree ought to be reversed; which was reversed accordingly.

From the whole of the cases on this subject, we may collect the following practical result:—1st. That if the mortgage-deed contains no limitations of the estate beyond the security, and reserves the equity of redemption to the husband alone, in that case the wife's original interest will be preserved to her, on the principle, that she being the sole owner of the estate, the mere form of the reservation of the equity of redemption, will be insufficient of itself to alter her prior title to the property, and the circumstance of the reservation having been made otherwise than to the owner of the estate, (the wife in the present instance,) will be presumed, by law, to have originated either in the *inaccuracy* of the language of the clause, or in the *mistake* of the person who prepared or engrossed the deed; circumstances, which could not, in justice, be allowed to prejudice the rights of the person having the prior title. But, 2dly, that if the mortgage-deed contains a settlement of the wife's estate, and the mortgage or the form of reservation of the equity of redemption, has nothing to do with the subsequent limitations of the property, but is perfectly distinct from them, as where the mortgage is for a term of years, and the limitations apply to the inheritance, in that case these limitations, through the medium of the wife's fine, will take effect; and the persons entitled to redeem will be, not the wife under her prior title, but the persons interested in the estate under the uses or limitations contained in the mortgage deed.

See a form for the mortgage of a wife's estate of inheritance, Appendix, No. XXX, and for the application of the same principle to dower and jointure, *antea*, p. 677, of this edition, note (D).

Limitation of estate to new uses, annexed to proviso for redemption, no effect: contra, if such limitation be distinct from form of proviso.

Motion for reversing decree.

Lord Eldon's concurrence in motion.

Recital that change of rights intended, unnecessary.

Practical result of cases.

of a mortgage for 1300*l.* taken in Lady Bacon's name. Lady Bacon dying, made her three daughters executrices, and their husbands gave a declaration of trust that half belonged to Lady Hare, and half to Lord Viscount Hereford. A settlement was made by the defendant, after she came of age, pursuant to the marriage agreement, and then Lord Hereford died, having made the plaintiffs his executors. The question was, whether this money should go to the plaintiffs, or should survive to the wife as a *chose* in action? The Lord Keeper, in determining, observed, that he laid no stress upon the declaration of trust; putting that out of the case, the law of the court would presume a promise; and, in all cases where there was a settlement equivalent, it would be intended the husband was to have the portion; the wife should not be permitted to have her fortune and jointure both, and the rather, in this case, because it was a trust, and the husband could not come at it so as to alter the property, without the assistance of a Court of Equity; and the defendant was condemned in costs (c).

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Case in text no authority.

(C) This is a mistake, no costs were given on either side, as appears by Mr. Raithby's n. (1), 2 Vern. 502. referring to Reg. Lib. 1704. A. fol. 444. This case is said to be strangely reported by Lord Com. Aston, in Amb. 692; and the principle of it is certainly at variance with the modern decisions on the subject. Mr. Cox, in his n. (D) to *Lord Carteret v. Paschal*, 3 P. Wms. 199, says, "it is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife in consideration of her fortune, the wife's portion, though consisting of choses in action, and though there be no particular agreement for that purpose, is looked on as a purchase by him, and will go to his executors;" and cites *Cleland v. Cleland*, Pre. Ch. 63; the principal case, *ubi supra*; and *Packer v. Windham*, Pre. Ch. 412. The case in the text evidently supports Mr. Cox's observation; but the very reverse of that statement of the law is the doctrine promulgated by the recent determinations. Instead of no particular agreement being necessary to convert the husband's anti-nuptial settlement into a consideration for the purchase of his wife's fortune, the modern cases have fully established that an actual agreement for that purpose, either express or implied, is absolutely requisite to confer on the husband the entire dominion of his wife's personal estate, mortgages, and choses in action.

Agreement requisite to make husband purchaser of his wife's choses in action.

That the husband's title to his wife's choses in action by settlement, depends on his express or implied contract to purchase them, the following cases will clearly evince. In *Heuton v. Hassell*, 4 Vin. Abr. 40, pl. 11, n. it appeared that the wife had lands of the value of 700*l.*, and also 500*l.*, due to her on bond, which at the time of her marriage remained in her brother's hands. Her husband, before their marriage, made a settlement, and in consideration of a considerable fortune and portion with his then intended wife, he granted, &c.; but of what particulars her fortune or portion consisted, did not appear by the settlement. The question was, whether the bond for 500*l.*, being a chose in action, and not called in by the husband during his life, was assets in equity to satisfy a debt of the husband's, the wife having enjoyed the benefit of the settlement made upon her out of the husband's estate, and which would have been liable to the demand? It was insisted for the creditor, that if the bond debt had been particularly mentioned as part of the consideration for the settlement, there would have been no doubt of its being assets of the husband; for, in equity, the husband would have been a purchaser of it by making the settlement: and that there was no difference where the consideration was of

But Lord Hardwicke observed, upon this head of equity, in his judgment in the case of *Lanoy v. Duke of Athol* (s), that

But settlement in this case must be made before marriage.

(s) 2 Atk. 444. [S. C. 9 Mod. 398.—Ed.]

the wife's portion generally, especially in this case where she had nothing but lands beside the bond for 500*l.*; so that the bond must be taken as the consideration of the settlement (there being no other), and the rather in favor of a fair creditor, who otherwise must lose his debt, and, if no settlement had been made, might have had a satisfaction out of the lands. But per Parker, Chancellor, the case is so very clear that the widow's counsel need not argue it. In this case creditors cannot be in a better condition than the executor of the debtor: and can it be imagined that if another person had been made executor to the husband, and such a person had filed a bill against the wife to compel her to assign this bond, that the court would have decreed for the executor? What the law gives the husband by the intermarriage is a good consideration for making a settlement; but the husband's making a settlement does not vest in him the choses in action of his wife, *unless it be expressly so agreed between the parties*, and that appears to be part of the consideration of the settlement, for then the husband is a purchaser, and well entitled to them in a court of equity. His Lordship therefore decreed, that the sum of 500*l.* secured by the bond was not liable to the demand of the husband's creditor.

Such agreement must appear on settlement.

On the same principle *Garforth v. Bradley*, 2 Ves. 676. was decided. In that case Lord Hardwicke said, the question before him would depend entirely on the construction of the marriage settlement and the covenants therein; for as to the general question the chose in action would certainly survive to the wife, if nothing by way of contract altered the case; for wherever a chose in action came to the wife, whether vesting before or after the marriage, if the husband died in the life-time of the wife, it would survive to the wife. With this distinction, that, as to those which came during the coverture, the husband might for them bring the action in his own name, and might disagree to the interest of the wife, and that recovery in his own name was equal to reducing it into possession.—The whole case, which is long and intricate, proceeds on the rule, that a contract or agreement is necessary to entitle the husband absolutely to his wife's chose in action. As to a suit at law in the name of the husband alone, see 1 Selw. N. P. 287.

Same law recognized by Lord Hardwicke.

This principle was again fully acknowledged by the Lords Commissioners Bathurst and Aston, in *Sawley v. Sawley*, Amb. 692. The case was to this effect—The wife was entitled to a rent-charge of 300*l.* under her marriage settlement, and she having survived her first husband, took another; but previously to the second marriage a settlement was made, by which, in consideration of such intended marriage, and for providing and settling a competent jointure and maintenance for her, and for making a proper provision for the children of the marriage, certain estates were conveyed to trustees for those purposes. A further settlement was made by the husband of 4000*l.* The husband died before the wife; at which time an arrear of 1098*l.* being due in respect of the rent-charge, a question arose, whether the wife was or was not entitled to it? It was determined in her favor, as having survived her husband, upon the principle that a mere settlement upon marriage is insufficient to raise a gift to the husband of his wife's personal estate; but that in order to entitle him to it *there must be an agreement*, either express or implied.

Mere settlement insufficient to raise gift to husband of wife's fortune.

It is also observable, that Lord Eldon, in a late case (*Druce v. Denison*, 6 Ves. 395) said, that according to the modern cases, it was established, that the settlement to be the purchase of the wife's fortune must either *express* it to be for that consideration, or the contents of the settlement altogether must import that; and *plainly* import it *as much as if it were expressed*. That such was the result of the cases upon the subject, and that it was not worth while to consider in what respect the older cases were unsatisfactory; involving inquiries not very easy to execute. And his Lordship was of opinion that a settlement by the husband, on his marriage with his wife, in the event of her surviving him, of considerable sums in government securities for her own use, with a covenant to secure to her an annuity for her life, would not entitle the husband to her choses in action to which she was

Settlement must contain or import an agreement.

all the cases to which this principle had been applied, were upon settlements made before marriage, and that he could not find a case so determined, where it was a voluntary settlement after marriage. And his Lordship, in that case, in which a second settlement had been made after marriage on an accession of fortune to the wife, held, that the husband was not *thereby* a purchaser of that accession of fortune; and the ground he went upon was, that there was *no* contract on the *part* of the wife; for *she* was *incapable* of contracting herself, neither had she a *father* or *guardian* to contract for her (t) (D).

(t) Et vide *Tomkins v. Ladbroke*, 2 Ves. 595. [*Adams v. Pierce*, 3 P. Wms. 11. *Rudyard v. Neirin*, Pre. Ch. 209. 2 Freem. 262. and *Marsh v.*

Head, 3 Atk. 720.—Ed.] If the acquisition be great, and the settlement disproportionate, a court of equity will, nevertheless, require

But though husband do not by settlement purchase his wife's choses in action, yet if he bequeath property to her, she will be put to her election.

Case where settlement after marriage, held to entitle husband to his wife's mortgage.

then entitled, as the settlement in the case before him expressed or imported no agreement that by making such provision he should have them, consequently they survived to her, if she outlived her husband. But the husband having by his will made bequests in her favor, and treated her choses in action as his own, and bequeathed them as such, as appeared from his books and certain papers which were given and admitted in evidence, the question terminated in that of *election*, so as to put the widow to elect whether she would give up her choses in action, and take under the will, or whether she would surrender her benefits under that instrument, and retain her own property. As to this latter point the reader is referred to *Dillon v. Parker*, 1 Swanst. Rep. 359, and the reporter's notes to that case throughout.

(D) Sir T. Clark held to the contrary in *Sykes v. Meynal*, 1 Dick. 368. In that case Ann Holden was married to three husbands; the first was entitled to the mortgage in question: he died, and appointed the defendant Ann his executrix and residuary legatee. She afterwards married S. B.: he made a settlement on her after their marriage and died; but the mortgage was not reduced into possession. She afterwards married T. H.; and he died. S. B. died intestate. The plaintiff, his sole next of kin, brought his bill to have the benefit of the said mortgage, insisting, that though it was not reduced into possession, S. B. became a purchaser of it by the settlement. Sir T. Clark, M. R.—“The single question in this cause is, whether a mortgage to the first of the three husbands of the defendant Ann Holden, of whom she was executrix and residuary legatee, is a chose in action not reduced into possession, or by any act done on the marriage of the defendant Ann with the said S. B., or since by settlement, it belonged to the said S. B.? In this case it depends on a settlement *after* the marriage. The property Ann was entitled to is part of the consideration of the settlement; though it might not have been good against creditors, it is good against the wife. In *Jones v. Marsh*, decided by Lord Talbot (for which see ante, 680), a very considerable sum came to the wife after the marriage by a collateral relation, in consideration of which the husband made a settlement of all his estate: it was held good, though against creditors.” His Honor then mentioned the case of *Lanoy v. Athol*, above stated, and concluded by observing, that he was of opinion that S. B. was a purchaser of his wife's interest in the mortgage: therefore he added, “S. B. by virtue of the settlement made by him, became entitled to the mortgage in question: and let an account be taken of what is due on it, and declare the plaintiff is entitled to one moiety, as sole next of kin of S. B., who died intestate; and that the defendant Ann Holden, his widow, is entitled to the other moiety.”

That case considered and deemed untenable.

This case is in direct opposition to the doctrine of Lord Hardwicke, in *Lanoy v. Athol*; but since it does not proceed on the principle of the previous decisions, much hesitation will necessarily arise before it can be ad-

It seems, that, in such cases, the *quantum* of benefit the wife receives by virtue of the settlement is immaterial; such cases

Quantum of benefit to wife immaterial.

her property to be settled (E), and see *Burdon v. Dean*, 2 Ves. jun. 607. [This latter case proves nothing directly to the point, but merely an inference that from the circumstances

of the case, it appeared that the wife's fortune was in contemplation of the parties when the settlement was made.—Ed.]

mitted as a sufficient authority to over-rule the firstly mentioned case. The two cases cited by his Honor, as warranting his decree, have, it is conceived, a contrary tendency; and it is worthy of particular regard to observe this difference between a settlement before and a settlement after marriage. The former is made at a period when the parties are able to contract with each other; the latter at a time when the law has denied them that power. And the principle, says Mr. Roper (1 Baron and Feme, 303), "is a general one, and not applicable to any particular case. It is this, that considering the relation between man and wife, and the opportunities which he has of practising upon her affection and fears, so as to take undue advantage, the law throws around her a shield of protection, and disables her from contracting personally with him relative to her property, except according to the forms which it has prescribed." If therefore the preceding cases prove that an *actual agreement or contract* is necessary to give to the husband his wife's choses in action, in consideration of the provision made by him for her, it appears to be a necessary consequence, that a settlement made *after* marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition), where the transaction is *between themselves only*, without the assistance of the wife's father or guardian, or the aid of the court, will not constitute the husband a purchaser, but the wife's title by survivorship will prevail notwithstanding this post-nuptial contract. On these grounds it is submitted that the case of *Sykes v. Meynal* cannot be maintained; for that a settlement after marriage will not bind the wife, or entitle her husband to her choses in action, except such settlement be confirmed by her after her husband's death (as mentioned in p. 752, ante), or unless it be confirmed under a decree in equity during the husband's life, or another settlement be directed by the court, and approved by the master, or except the contract were between the husband and the wife's father or guardian, or trustee acting for her, and the transaction were *bonâ fide* and equitable.

(E) In a case where considerable accessions of personal property accrued to the wife after the marriage it was held, that she was entitled to a further provision in favour of herself and children, on the ground, that the settlement on her marriage was inadequate to the fortune she afterwards acquired; and it was referred to the Master, to see that a proper sum was settled on her and her children; regard being had to the extent of her fortune and the settlement already made. *Lady Elibank v. Montolieu*, 5 Ves. 737. In another case on this subject it appeared from the settlement, that the wife had given up to her husband a great part of her fortune, who, in consideration of such fortune, covenanted to make a provision for his wife and children: Sir W. Grant said, that the mere fact of a settlement was not evidence, that the husband became a purchaser of all the fortune that might afterwards come to the wife, that the settlement in the cause appeared to be in consideration of her fortune as specified and described in the deed itself, part of which was settled and part paid to the husband, so that he could not be considered a purchaser of any thing more than the fortune the wife then had. See *Milford v. Milford*, 9 Ves. 89. Consistently with this doctrine, his Honour decided the case of *Carr v. Taylor*, 10 Ves. 574; there the consideration of the settlement was expressed to be the portion or fortune which the husband would have or receive on the marriage. The wife afterwards became entitled to a share in the residuary estate of an intestate, part of which consisted of a bond debt due from the husband and his father. The husband having become a bankrupt, the question was, whether the wife was entitled to an additional settlement out of property accrued to her after the date of her marriage settlement; which could not be, if by such settlement, the husband had

Wife entitled to additional settlement, when future accessions are great.

As to additional settlement in bankruptcy.

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proceeding upon the ground of equality; there being a settlement made by the husband on his wife, whereby he becomes a purchaser of her fortune; and therefore, on the one hand, as she is to have the provision made by the settlement, so, on the other, he shall have her whole portion.

Settlement of wife's own estate enough to give husband her fortune.

And it is not necessary that there should be a settlement of any estate by the husband upon his wife (*u*); if she have a provision, in case she should survive him, out of her own estate, that will entitle him to the remainder of her fortune, although nothing moves from him; for it is sufficient that such is the agreement of the parties; because, if he reduces it into possession during the coverture, it will be his absolutely, and he might release it. If there be no agreement, the law, which gives her the chance of survivorship, must take place, but she waves that chance by an *express agreement* of having so much at all events; and the husband's departure from that absolute right which the law gives him over the whole, either by reducing such debt into possession, or by releasing it, is of itself a sufficient consideration (*F*).

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Except wife be infant, or settlement be voluntary.

But as the last-mentioned cases rest upon its being the express agreement of the parties (*x*), the principle will not apply where the wife is an infant at the time of such settlement, or

(*u*) *Adams v. Cole*, Ca. temp. Talb. 169, 170. (*x*) Vide 2 Atk. 448, 449.

purchased for his own benefit, all subsequent property to which his wife might become entitled during the marriage. The Master of the Rolls decided, that as the settlement might be construed to mean either the fortune which the husband would actually receive at the moment of the marriage, or the rights he would acquire by the marriage; and as the latter intention was *neither expressed nor clearly imported* in such settlement, its operation should be confined to the wife's property at her marriage; so that her husband was not a purchaser of her after-acquired personalty, and consequently, that she was entitled against his assignees to an *additional settlement* out of it. On this latter subject, see *Beresford v. Hobson*, 1 Madd. Rep. 362, and cases there cited.

Provided there be express agreement that he shall have it.

(*F*) In this case the husband, having no property of his own, by an obligation given by him to trustees, reciting that *his intended wife's fortune amounted to about 500*l.**, agreed to pay to her annually 10*l.* for her separate use, and that if he survived her, she should have the power to dispose, by will, of 100*l.*, her wearing apparel, watch, rings, and jewels; but if she happened to be the survivor, then he stipulated to leave her 200*l.* and all her wearing apparel, &c. to be at her sole disposal; and for better securing the premises he agreed, upon request, to settle lands of the yearly value of 12*l.* The wife being entitled to a debt of 200*l.*, secured by bond given to her *dum sola*, the question was, between the surviving wife and the residuary legatee of the husband, whether this bond debt, as a chose in action, and not reduced into possession by the husband, was the property of her, or of the residuary legatee? Lord Talbot determined in favour of the latter.—In this case, therefore, there may be said to be an express contract between the husband and wife, to divide the wife's fortune in manner above-mentioned, she agreeing to take part of it in certainty, rather than run the risk of losing the whole by her husband's receipt of it during the marriage, so that thereby the husband became a purchaser of the bond debt for 200*l.*

where the settlement is made after marriage; for in such cases the wife is incapable of contracting.

But if a settlement, made before marriage, be expressly made in consideration of *part* of the wife's property *only*, *that* will destroy the presumption that it was made in contemplation of the *whole* of her fortune; and, in such case, I apprehend, what is not specifically conveyed to the husband will survive to the wife.

Settlement by husband in express consideration of part of wife's fortune, deprives him of residue.

Thus (y), where on the marriage of the plaintiff's father with the defendant, who had a portion of 300*l.* in her brother's hands, secured by his bond, a farm was settled upon the defendant for her jointure, expressly in consideration of 100*l.* paid for her marriage portion; the husband afterwards dying indebted by bonds, wherein he and his heirs were bound, and actions being brought thereupon against the plaintiff, as his heir, to subject the real estate descended to the payment thereof, he exhibited his bill to have the remaining 200*l.* of the portion, which was unpaid, applied in discharge of the debts. It was pretended by the defendant, that there was but 100*l.* of her portion to be paid, and that it was agreed by her husband and herself before marriage, that the remaining 200*l.* should be her's; and besides that her husband being dead, and this being a debt to her, not disposed of, it did by law belong to her. But, for the plaintiff, it was said to have been expressly agreed before the marriage, that the remaining 200*l.* of her portion should be applied to pay the husband's debts, if there was occasion. Neither of the agreements were well proved. The Master of the Rolls decreed the 200*l.* to be applied towards payment of the husband's debts; but, on appeal to the Lord Chancellor, his Lordship was of opinion, that as the case was, unless there was an agreement that the husband should have the 200*l.* it would survive to the wife, and therefore his Lordship directed an issue as to this point.

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And if (z), on the marriage, there be an agreement made in consideration of the wife's portion, to make a settlement upon her for a jointure, and to settle lands upon the children of the marriage, and the wife dies before the settlement can be made, yet her portion shall go to the husband or his representatives, and shall not survive to the representatives of the wife; for he, being in no default, ought not to suffer by the act of God.

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Husband agreeing to make settlement, takes his wife's fortune, though she die before settlement made.

(y) *Cleland v. Cleland*, Pre. Ch. 312. Gilb. Eq. Ca. 70. 1 Eq. Ca. 63. S. C. 1 Eq. Ca. Abr. 70, pl. 15.
(z) *Meredith v. Wynt*, Pre. Ch.

Except settlement full short of what was agreed on.

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Husband entitled to wife's mortgage, as a chose in action, if he reduce it into possession in his life-time (M).

But (a), in such case, where a wife survived her husband, who, it was alleged, had, in consideration of her fortune, which he expected to receive (and which was represented to consist of lands and money on bond, and to be of the value of 500*l.*) settled upon her a jointure of 45*l. per annum*; the wife alleging the jointure fell short of what, by the marriage agreement, it ought to have been, and no fine having been levied, nor assignment made of the bonds, the court dismissed a bill brought by the husband's creditors to subject her property to his debts; saying, that the widow had the title in law to the lands, and the securities remaining unaltered, and being choses in action, the benefit whereof survived to her, equity would not interfere to wrest them from her (G).

If a *feme covert* be a mortgagee, her husband, by virtue of the marriage, will be entitled to the mortgage as a chose in action, though there be no settlement; and, if it be reduced into possession in his life, it will go to his executors, and not survive to his wife. The case of *Parker v. Wyndham* (b), as

(a) *Lister v. Lister*, 2 Vern. 68. S. C. 2 Freem. 102. 1 Eq. Ca. Abr. 68, pl. 3.

(b) Pre. Ch. 412. Gilb. Eq. Ca. 98. 102. And this case was approved by Lord Hardwicke, in the

case of *Garforth v. Bradley*, 2 Ves. 676, and see his Lordship's observations on this subject there. [cited *ante*, 741, of this edition, n. (C). —*Ed.*]

Husband must perform his covenant before he can claim his wife's choses in action.

(G) It may here be in order to observe, that when the husband is a purchaser by settlement of his wife's choses in action, if the provision for his wife and children be executory, that is, if it rest upon his covenant, then neither he nor his assignees will be entitled to recover them in equity, until they have specifically performed the stipulations in the settlement; if, however, the covenant be future and contingent, as that the husband's executors should, after his death, if his wife survive him, pay to her a sum of money, then, as the act to be done in performance of the covenant is contingent, and may never happen, and the husband's right to his wife's choses in action by purchase under the settlement is immediate and absolute, the court will not postpone his title to receive them until he perform such an act as he engaged to do by the covenant. *Basevi v. Serra*, 14 Ves. 313. S. C. 3 Meriv. App. 674. But when the husband's covenant to pay or settle amounts to a present and certain obligation, as to do the act immediately or at a fixed period, then the wife will have a lien upon her own property for the consideration agreed to be given by the husband for its purchase, which must be paid or settled before the court will take from her such property. *Mitford v. Mitford*, 9 Ves. 96.

Of choses in action, and reduction of them into possession.

(H) The preceding cases (beginning with *Blois v. Hereford*, *ante*, 764, of this edition) prove, that where the husband makes a settlement on his wife, under an express agreement that he shall be entitled to all his wife's fortune, whether consisting of choses in action or otherwise, he will then be considered as a purchaser, and the choses in action of his wife will belong to his representative, though not reduced into possession during his life-time. We now turn to a case which decides, that the husband will be entitled to his wife's choses in action, without a settlement, *provided he reduce them into possession during his life-time*; but nothing short of an actual receipt of the principal, or an entire change of the property of the chose in action will be sufficient to reduce it into possession. There must be something to divest the wife's right, and to make that of the husband's absolute; such as a judgment recovered in an action commenced by him alone, or an

to this point, was attended with circumstances peculiarly striking. It was thus: Mrs. Anne Ashe, being entitled to the sum of 5500*l.* secured to her by a mortgage for years taken in the name of trustees, and likewise to 3000*l.* secured in the same manner, taken in her own name, and to other personal property, became a lunatic; and, on a commission of lunacy issued out for that purpose, the custody of her person and estate was committed to one of the defendants. Some time after, Philip Parker, the plaintiff's brother, by some contrivance, got at the lunatic and married her, without making any settlement or provision for her, Parker and others were afterwards committed by the court to the Fleet, and it was ordered, at the same time, that all the deeds and securities relating to the lunatic's fortune, and also her jewels, &c. should be brought and lodged with one of the Masters of the Court, in order to secure some provision for the wife in case she should survive her husband, and likewise for the children of that marriage, in case there should be any. Some time afterwards, on Mr. Parker's application to the court, by petition, to have the commission of lunacy superseded, it was so directed; but, in regard Mr. Parker's estate was much incumbered, and he had made no settlement on his wife, it was, at the same time, ordered that so much of the 5500*l.* as was necessary, should be applied towards disencumbering his estate, and the residue laid out in a purchase of lands, which, together with so much of Mr. Parker's estate as would make up 500*l.* *per annum*, was to be settled in strict settlement, and the rest of his lady's fortune was to be paid and delivered to him. Mr. Parker never complied with any part of this order, but, being indebted to one Goodinge in a considerable sum of money, Goodinge brought his action against him, recovered judgment, and took out a

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award of execution upon a judgment recovered by him and his wife, or a decree in equity for payment of the money to him, or to be applied for his use. Pre. Ch. 412. 418. So, a release of the chose in action by the husband alone for valuable consideration, will be a reduction of it into possession, 1 Pres. Abr. 349, and *postea*, 776, but mere receipt of interest on a mortgage, bond, legacy, or note, will not amount to that alteration of right which is requisite to dispossess the surviving wife of her title to the chattels belonging to her before marriage, or accruing to her during coverture. See *Nash v. Nash*, 2 Madd. Rep. 139. And the same, it is presumed, may be said of a verdict obtained by the husband in an ejectment against the tenant in possession of the mortgaged premises, for thereby the right to the chose in action will not be altered, but only secured or enforced, see *postea*, p. 777. And for further on the subject of choses in action in general, see Butl. Co. Litt. 351 a. n. (1). 1 Pres. Abr. 347. 1 Rep. Bar. & Fem. 201, and 1 Madd. Ch. 478, 2d ed. And that the wife should join her husband in a suit at law for her choses in action, see 1 Selw. N. P. 287, n. 5th edition.

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fi. fa. and thereupon the mortgage of 3000*l.* was sold by the sheriff, and the debt paid. After this, Mr. Parker, being indebted to the plaintiffs, his sisters, in about 2000*l.* each, given them for their portions, did, by indenture taking notice thereof, assign 5500*l.* mortgage, and all securities taken for the same, and also all other the fortune and portion belonging to him in right of his wife, to trustees, in trust, in the first place, to pay thereout to the plaintiffs their portions, and then, in trust for himself, his executors and administrators. Some time afterwards the 5500*l.* was paid in, and Mr. Parker not having complied with the terms of the last order, that sum was again placed out at interest on a security taken in the name of a junior Master of the Court; subsequent to which, Mr. Parker died intestate and without issue, and in about two years Mrs. Parker died likewise intestate and without issue. Whereupon the plaintiffs, who were sisters and heirs at law to Mr. Parker, and also creditors as above-mentioned, took out letters of administration to Mrs. Parker, the wife, and brought a cross bill to have the fortune and securities delivered over to them.

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And the court resolved (c), that as to the marriage, it was then out of the case, and that the order of the 19th of March was likewise to be laid aside; for as the husband, if he had complied with the terms of that order, would have been a purchaser of his wife's fortune, so he, not having complied with it, it was just as if no such order had been made; that the wife being now dead, and no children left, the reason for this court's interposing was at an end, and then, as to the 5500*l.* that being paid in during the coverture, was the husband's money, and the property absolutely vested in him at law. That although the court had thought fit to lay their hands on it, and had power so to do, it having been paid into the Master's hands, yet that was only in the nature of a caution till the husband should make some provision for his wife, which being then unnecessary, equity would follow the law and give it to the husband's representatives, to whom it belonged. As to the 3000*l.*, that being sold by the sheriff on a *fi. fa.* before the husband's assignment, the sale must take place against the assignment, though perhaps the plaintiff might have an equity to the remainder, after payment of Goodinge's debt; for the husband might assign over a term on mortgage for years, which he had in right of his wife, and so he might likewise

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(c) Et vide *Cleland v. Cleland*, and *Blois and Martin v. Lady Hereford*, *supra*, 764. 768.

the trust of such term, and it would prevail against the wife although she survived (d).

If the wife die possessed of a mortgage, and the husband survive, it will vest in the husband, by virtue of the statute of distributions (e), for the *proviso* therein, saying, "that the statute shall not extend to the estates of *feme coverts* that die intestate, but that their husbands may have administration of their personal estates, as before the making of the act," was made in favour of the husband, and not to his prejudice; so that it was intended by parliament, that the husband should be within the statute of distribution, so as to take the wife's *choses* in action as to his benefit, but should not be within the same, as to his prejudice; and this is upon good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though never so remote, which was not the intent of the statute.

The husband must actually reduce a mortgage to which he is entitled in right of his wife into possession, by procuring payment thereof; or an alienation of it by him will not be binding upon her after his death, *unless it be made for a valuable consideration*; for if it be otherwise, and he die, she surviving, such mortgage will go to her as a *chose* in action, and not to his executor. Thus where the plaintiff's testator having

Surviving husband entitled to wife's mortgage under statute of distributions (1).

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Husband's release of wife's mortgage in fee not a reduction of it into possession, unless made for a valuable consideration.

(d) Et vide *Bosvil v. Brander*, 1 P. Wms. 458, S. C. infra, 778. (e) Vide 1 P. Wms. 382. 29 Car. 2.

(1) The true mode of expressing this rule is adopted by an eminent cotemporary writer, thus, "If the husband survive the wife, then these choses in action will belong to her personal representative, and the husband may take them as such; but then they must be applied in a due course of administration, and consequently in discharge of the debts, if any, owing by the wife, under contracts made by her *while sole*." 3 Pres. Abr. 349. Though the husband be not as such of kin to his wife (*Watt v. Watt*, 3 Ves. 244. 14 ib. 382. and *Bailey v. Wright*, 18 ib. 49), yet, since the statute of distributions does not extend to the estate of a *feme covert*, he will be entitled to her personal estate *jure mariti*, and exclude every other person. 29 Car. 2. c. 3. s. 25. 2 Bl. Com. 515. In *Squib v. Wyn*, 1 P. Wms. 379, where a *feme covert* who was possessed of choses in action died, and her husband administered and made a voluntary assignment, this was held to be an alteration of the property and a reduction of the chose in action into possession. The reporter adds, see *Cart v. Rees*, in *Michaelmas* 1718, where this stronger case happened (*viz.*) A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord Parker held, that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's choses in action being, by the statute of distribution, vested in the husband, *as next of kin to the wife*. The same principle was acknowledged by Lord Hardwicke without any reference to *Cart v. Rees* in *Elliot v. Collier*, 3 Atk. 526, where it was held, that if a husband die before he administer to his wife's personal estate, it shall not go to her next of kin but to his representative.

Husband surviving entitled to entirety of his wife's personal estate.

And choses in action without letters of administration.

married the sister of the defendant (*f*), whose portion was secured to her by a mortgage in fee of part of the defendant's estate, after marriage made an assignment of his interest in the mortgage; and, by articles between him and several trustees therein named, the money was to be called in and invested in land, to be settled to the use of the husband and wife and their issue, remainder to the right heirs of the husband. The husband and wife being both dead without issue, the plaintiff claimed the benefit of the mortgage by virtue of the articles, as entitled under the husband. But the court dismissed the bill, because the mortgage being put in the nature of a *chose* in action, the husband had not an absolute power over it, but only a right to reduce it into possession, which not having done, his assignee stood but in the place of the husband, and could have no greater right or power than the husband himself had, and that was only to reduce it into possession in his lifetime, and he having neglected so to do, it survived to the wife, notwithstanding the articles, and must go to her administrator (*x*).

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(*f*) *Burnet v. Kinnaston*, 2 Vern. 401, et vide S. L. Pre. Ch. 118. 3 P. Wms. 200, [and see 2 Freem. 239. 2 Verp. 68. Gilb. Eq. Ca. 98.

Ca. temp. Talb. 168 to 170. 1 Atk. 280. 459. 2 Atk. 207. 9 Ves. 98. 12 *ibid.* 178, and 2 Madd. Rep. 16. —Ed.]

Cases in text
good law.

(*K*) The distinction here taken between a voluntary assignment and an assignment for valuable consideration, the wife surviving being bound by the latter, though not by the former, appears to be good law. It was acknowledged by Sir W. Grant, M. R. in *Mitford v. Mitford*, 9 Ves. 99, and was said by him to have been adhered to and acted on ever since the determination of the case quoted by the learned author. By the report of the principal case in Pre. Ch. 119, it appears that the husband survived the wife, and took out letters of administration to her effects; and having devised this interest died, and the contest was between the devisee of the husband and the administrator *de bonis non* of the wife.

Husband may
assign wife's
mortgage for
years, but not
her mortgage
in fee. (See
qu.)

If the mortgage in *Burnet v. Kinnaston* had been a mortgage for years, the husband, it has been thought, might have disposed of it under the rule laid down in *Sir Edward Turner's case*, cited *antea*, p. 473, of this edit. in the text, and then the consideration would not have been material. See Mr. Raithby's note (1) to 2 Vern. 402. But this seems doubtful law; and it is observable that nothing in the form of decision or dicta appears on the point. If the term be vested in trustees, it is a doctrine very difficult to be maintained; for to hold that the husband's assignment would deprive the wife of the mortgage money, on the ground of such assignment being, in fact, the assignment of a term of years, would be to make the mortgage term the principal, and the money the accessory, which cannot be admitted. A modern writer, of much reputation, remarks, "But money of the wife secured upon a mortgage in fee, is not equally in the husband's power as money secured by a term of years, so that the decisions in regard to the two are different; for a mortgage in fee the husband cannot dispose of. The estate, therefore, continuing in the wife, carries to her surviving, the money along with it. The security, then, not being assignable without her concurrence, the debt classes among her equitable choses in action." See 1 Rep. Baron and Feme, 221. That money due on mortgage belonging to the wife should be classed among her equitable choses in action may be true, and this it will be well to remember in reference to the positions ad-

But it seems reasonable to presume (g), that if the husband brings an ejectment, and gets into possession of an estate mortgaged, a voluntary assignment of the mortgage by the husband would alter the property; for that case appears to be in a great degree analogous to the case of an extent on the wife's judgment, which clearly is such a possession of the debt, as vests it in the husband to dispose of it at his will and pleasure (l).

Although a mortgage, to which the husband is entitled in right of his wife, will survive to her in case of his death as against his executors or assignees to his use; yet if his creditors get possession thereof, and thereby oblige her to apply to a Court of Equity for aid, the court will not interpose its authority to take the benefit from them. Thus where a *feme sole* (h), mortgagee in fee for 800*l.* had married a tradesman who became a bankrupt, on a commission of bankruptcy being taken

Or unless made after he has obtained possession by ejectment.

Husband becoming bankrupt, assignment to assignees, a reduction of wife's mortgage into possession for benefit of husband's creditors.

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(g) Vide S.P. Wms. 200.

(h) *Bosvil v. Brander*, 1 P. Wms. 458, *supra*, 775. Et vide *Lord Carteret v. Pascal*, 3 lb. 197, [where it was held, that a voluntary assign-

ment by a husband of an interest in lands (analogous to an estate by elegit), which his wife was entitled to under a decree of equity, was good.—*Ed.*]

vanced in the sequel of this chapter. But that the wife's mortgage in fee, or rather that money belonging to the wife secured by a mortgage in fee, is such a chose in action that the husband cannot dispose of by assignment for valuable consideration (abating its repugnance to all principle), seems incidentally to have been denied by great authority in *Bosvil v. Brander*, the case next quoted by the learned author in the text. In that case the assignment of commissioners of bankrupt passed the money due on the wife's mortgage in fee to the assignees; and the court declared, that as to the legal estate which remained in the wife, she was as to that a trustee for the assignees.

(L) A verdict obtained by the husband in an ejectment against the tenants in possession of the premises, whereon the wife's chose in action is secured, would not, it is conceived, be of itself a sufficient act on the part of the husband to reduce the chose in action into possession; for the money being still due on the mortgage, it is, notwithstanding the ejectment, a chose in action belonging to the wife. The only alteration effected by the ejectment is, that the husband receives the rents of the estate instead of the interest of the mortgage money; and receipt of interest, we have seen, *antea*, p. 746, of this edit. n. (H), will not alone be enough to reduce a mortgage belonging or accruing to the wife into possession. If this reasoning can be depended on, there is little weight in the learned author's argument, from the analogy which this case is said to bear to that of an extent on the wife's judgment, because in that instance the money is actually paid or adjudged to be paid to the husband, which is, or is equivalent to, a receipt of the money. And it is observable, that a verdict in ejectment against the tenant in possession is widely different from a decree of foreclosure *in favorem* the husband's favour; for there the money is decreed to be paid to the husband himself within a certain time, or the mortgagor to be for ever foreclosed, and such a decree would without doubt be sufficient to carry the chose in action to the husband's representative against the wife surviving, should the husband die in the mean time. See *Forbes v. Phipps*, 1 Eden. Rep. 502. and *Murray v. Elibank*, 10 Ves. 91. The consequence is, that a voluntary settlement or assignment of the wife's mortgage by the husband after judgment in ejectment cannot be looked on as the source of an unimpeachable title.

Voluntary assignment after ejectment, considered insupportable.

out against him, the commissioners had assigned over all his estate, real and personal, which included this mortgage. Afterwards, the husband being dead, and the writings relating to the mortgage being in the assignee's hands, a bill was brought by the widow of the bankrupt against the assignees for them, and to have the benefit of the mortgage. But it was held by his Honour, the Master of the Rolls, that the widow being plaintiff against the assignees, so that she, and not they, sought aid in equity (M), and there being in the mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *chose* in action was well assigned by the commissioners to the assignees, and vested in the assignees, as plainly it was, the legal estate of the inheritance of the lands in mortgage continuing in the wife was not material, it being no more than a trust for the assignees.

[779] For the trust of the mortgage must follow the property of the debt, else the mortgagor would be in a very hard case, namely, liable to be sued by the assignees of the commissioners upon the covenant, and also in an ejectment by the wife of the mortgage, whereas the latter suit would be enjoined in equity (N).

That suit is by and not against widow, immaterial.

(M) This circumstance that the suit was instituted *by*, and not against the widow, seems at present to be of no consideration. Mr. Vesey in a note to *Elibank v. Montolieu*, 5 Ves. 739, n. (b), thus observes:—"The distinction upon which *Bosvil v. Brander* was decided in favour of the husband's assignees, and, as it seems, without giving the wife any part of the fund, [namely,] that the assignees were not the plaintiffs, has certainly not been attended to in the more recent authorities; and this farther observation arises upon that case, that it is questionable whether it could afford a ground for the application of the principle upon which that distinction rests: the subject being a mortgage; with respect to which it must be remembered, that supposing the estate to be absolute at law, the mortgagee, whether as defendant to a bill of redemption, or as plaintiff in a bill of foreclosure, is forced into the Court of Chancery by the equity of the mortgagor." *Et vide postea*, 781, *in notis*. In the following references the wife was plaintiff, *Car v. Taylor*, 10 Ves. 574. *Coysegame ex parte*, 1 Atk. 192. *Meals v. Meals*, 1 Dick. 573.

Wife's choses in action pass by assignment in bankruptcy or insolvency, but not her reversionary interests.

(N) The principle to be deduced from this case is, that if a wife before her marriage has a debt due to her by mortgage, it will pass absolutely by the assignment under a commission of bankrupt against her husband, unless the assignees are obliged to seek the aid of a court of equity, who will compel them to do the usual equity in making a suitable provision for the wife, if that was not done at the time of the marriage. And this may be advanced as good law at the present day, see 1 Christ. B. L. p. 488. What interests of the wife so vest in the husband as to belong to his assignees upon a bankruptcy, was the leading question in dispute in *Saddington v. Kinsman*, 1 Bro. C. C. 43, a case which was compromised without a decree. The law however seems to be now settled, that the general assignment either in bankruptcy, or under the insolvent act, does not operate as a reduction into possession of a surviving wife's reversionary interest in personal property, and that the courts are now anxious to protect the reversionary interests of feme coverts. See *Gayner v. Wilkinson*, 2 Dick. 491. S. C. 1 Bro. C. C. 49, n. (†). *Pringle v. Hodgson*, 3 Ves. 617. *Mitford v. Mitford*, 9 ibid. 98. *Woodlands v. Crowther*, 12 ibid. 174. *Hornsby v. Lee*,

But if there had been any articles before the marriage (i), purporting that this mortgage-money should have continued in the wife as her provision, or should have been assigned in trust for her, they would have been a specific lien thereupon, and have preserved it from the bankruptcy (o).

Except mortgage be specifically settled on wife before marriage.

In the last case, the Master of the Rolls observed, that it might have been a matter of different consideration, if the assignees had been plaintiffs in equity, and desired the aid thereof to strip the widow of all that she had, towards the doing of which, equity would hardly have lent any assistance; because the assignees claiming under the bankrupt husband, could be in no better plight than the husband would have been; and if the husband had in equity sued for the money (j), or else prayed that the mortgagor might be foreclosed, equity, probably, would not have compelled the mortgagor to pay the money to the husband, without his making some provision for his wife; or at least the wife, by an application to the court against the husband and the mortgagor, might have prevented the payment of the money to the husband, unless some provision had been made for her.

Husband or his assignee suing in equity to obtain wife's personal property must make provision for her.

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But even in that case, I should apprehend (k), that if the husband was living, the assignees of the bankrupt would be allowed the interest of the mortgage during his life, because to that he would have been entitled (p).

Husband's assignee entitled to interest at least, of wife's mortgage during husband's life.

(i) 1 P. Wms. 459. *Bennet v. Davis*, 2 P. Wms. 516.

Wms. 582. *Gilb. Eq. Ca. 140*, and *Moor v. Mycault*, Pre. Ch. 22.

(j) Vide *Jacobson v. Williams*, 1 P.

(k) *Ibid*.

2 Madd. Rep. 16. *Nash v. Nash*, ib. 153. *Picard v. Roberts*, 3 Madd. 384, sed vide 10 Ves. 580, 1 Christ. B. L. 270, and Mr. Canning's observations on the question, how far a contingent or reversionary interest of husband and wife in her right in personal estate is assignable in deed, or in law, during the coverture, 1820.

(O) And if lands are left by will to a married woman for her sole and separate use, and no trustee is appointed, the husband will be considered in equity as the trustee; and if he becomes bankrupt, no interest in the premises can be conveyed to his assignees. This was the point decided by *Bennet v. Davis*, cited supra in the text, n. (i). Quære, Does not the husband's trusteeship cease with the coverture?

Husband may be trustee for wife.

(P) The learned author in the index to his fourth edition, says, "But the creditors shall have the interest during their joint lives, 780." This is perhaps the more correct mode of expressing the conception in the text, as in the instance where the husband is entitled to the interest only of the wife's mortgage, he can have it but during the coverture, that is, during the joint lives of himself and wife.

It is clearly settled, that since the husband is obliged to maintain his wife, he will be entitled to receive the annual produce of her property, although he decline to make a settlement on her. And the husband being thus entitled to the whole annual income of his wife's property, his assignees in bankruptcy, or under the insolvent debtors' act, or trustees under his own assignment to pay debts, will, as representing him, be entitled to receive such income; out of which they will be obliged to make a settle-

Husband's assignees take annual produce of wife's property, subject to making her an allowance.

Doubtful what passes by husband's assignment of wife's equitable interest.

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Husband coming into equity for wife's personal property must settle maintenance on her (a).

It appears from the surprise and disapprobation expressed by Lord Chancellor Finch (l), in the case of *Pitt v. Hunt*, at the resolution of the House of Lords, in *Sir Edward Turner's case*, that previous to that determination, it had been held as clear and settled law, "that the husband could not dispose of property held in trust for his wife, existing without *his privity*, and not created fraudulently, before marriage." And it seems still doubtful, at least, to what extent the assignment of the husband of the wife's equitable interest, except in a case of the trust of a term for years of land, is binding upon her.

It is the constant practice of the Court of Chancery to oblige a husband, who comes into equity for his wife's *personal* property (m), or any thing he claims in her right, *jure mariti*, to make a settlement upon his wife by way of jointure, or to secure a maintenance for her in case she outlives him, and the court will not interfere till that be done, not even where she is a party to the suit. And it will make no difference, though there be other provisions for the wife's separate use before marriage,

(l) Vide 1 Vern. 18, supra, 745. 2 Vern. 494. *Lupton v. Tempest*,
(m) Nels. Ch. Rep. 377. Skin. 288. 2 Vern. 626. 2 Ves. jun. 562.

ment or allowance to the wife for her support. Thus it was distinctly held, in *Pryor v. Hill*, 4 Bro. C. C. 139, that the assignees under a general assignment for the benefit of the husband's creditors, should not take dividends settled on the insolvent's wife for her life, unless they would make a provision for the wife. So Lord Alvanley held, in *Brown v. Clarke*, 3 Ves. 166, that assignees of a bankrupt taking his wife's fortune out of the court, must make a provision for her; and, in that case, they consented to give her half. His Lordship was of the same opinion in *Lumb v. Milnes*, 5 Ves. 517. And Sir W. Grant, M. R. in *Wright v. Morley*, 11 Ves. 21, after reviewing the principal authorities, said the result was that the wife's life interest passed to the assignees, subject to the ordinary equity for a settlement.

Established rule (though of doubtful policy) that wife is entitled to provision for property which she brings her husband.

(Q) This is a very old head of equity. It is adverted to by Lord Keeper Coventry, in *Tanfield v. Davenport*, Toth. 114. But Lord King said he thought it extraordinary that the Court of Chancery should interpose against the husband in cases where the law gave him a title to the wife's personal estate; and undoubted experience had shewn, that such interposition, unless where the husband had appeared to be a profligate or extravagant man, had been the occasion rather of mischief than of good. *Milner v. Colmer*, 2 P. Wms. 641. Lord Cowper too thought the doctrine broke in upon the legal title which the husband had to his wife's personal estate; and the method, however intended originally as a cautionary provision in favour of the wife, had sometimes proved inconvenient; nevertheless custom and long usage had sufficiently established it, and his Lordship could not take upon himself to alter it. *Brown v. Elton*, 3 P. Wms. 205. The first Vice-Chancellor (Sir T. Plumer) also said it was difficult to discover the ground of the wife's equity, see *Lloyd v. Williams*, 1 Madd. Rep. 458. This equity however is now clearly established, not only against the husband personally, but against all persons claiming under him, whether by operation of law or otherwise. 1 Madd. Ch. 480.

yet if a great accession afterwards comes, the court will not suffer the husband to exhaust it (n) (R).

(n) Per Lord Hardwicke, 2 Ves. jun. 595. *Burdon v. Dean*, 2 Ves. jun. 607.

(R) In *Burdon v. Dean*, 2 Ves. jun. 607, the wife being entitled to 1000*l.* under her father's marriage settlement, it was prior to her marriage settled thus:—500*l.* of it were to be paid to the husband, and the residue to be settled upon herself and children. The wife being entitled to other property, no notice was taken of it in the settlement. The husband having become bankrupt, the question was, whether she was entitled to a provision out of such other property as against the assignees, or was barred of that equity in the provision made for her by the settlement? Lord Alvanley decided, that the settlement did not bar her right to a provision out of her other property: and his Lordship admitted that the equity of a wife to have a provision out of her trust property claimed by the husband, attached upon newly-acquired property as well as upon property which belonged to her before marriage, but his Lordship doubted whether the wife's equity had been extended to a trust of real estate, to which the wife may be entitled for life.—There is good reason it is apprehended for this doubt.

Lord Rosslyn, C. put the rule on this principle, that where the persons claiming in right of the husband, however meritorious their consideration, are obliged to come to an equitable jurisdiction to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the court will not apply it to the use of the husband only, leaving the wife to starve. *Oswell v. Probert*, 2 Ves. jun. 682. The same law was distinctly acknowledged in *Freeman v. Parsley*, 3 Ves. 424. and in *Milnes v. Lamb*, 5 ib. 517.

From the language of some of the cases it should appear that the jurisdiction of the court is confined to cases where the husband or the persons claiming under him are plaintiffs, see antea, p. 778, n. (M). It is however now settled, that the wife by her next friend may file a bill on her own account, which the court will entertain if the subject be of equitable not of legal cognizance. Thus in *Lady Elibank v. Montolieu*, 5 Ves. 737, Lady Cranston died intestate; possessed of large personal property; leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her. The bill was filed by Lady Elibank, one of the sisters of Lady C., against her husband Lord Elibank, and against Montolieu the administrator, praying an account of the plaintiff's share, and that it might be settled on her and her family. Montolieu by his answer, insisted upon retaining the plaintiff's share towards satisfaction of a debt due to him from the plaintiff's husband, on the ground of a provision made for her by settlement previous to her marriage with Lord Elibank; but that settlement, it was proved, was not adequate to her fortune, and appeared to have been made upon the expectation, that by circumstances to occur in the family, there would be an opportunity to do better for her ladyship at a future period. The question was, whether the plaintiff was entitled to the relief prayed by her bill, as against Montolieu the administrator, under the circumstances stated? Lord Rosslyn said he wished to consider the case. On a future day his Lordship delivered judgment as follows:—"The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am clearly of opinion the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator. With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would

Wife's equity for a provision applies to newly acquired property, as well as to that possessed before marriage, but not to trust of real estate.

Lord Rosslyn's expression of rule.

Wife's equity so far settled that she may file a bill to enforce it, though she have settlement before marriage which is inadequate, or which was not intended to embrace future acquisitions.

And a court of equity, where it was in proof that a husband had ill-treated his wife, decreed the interest of money, part of her portion, to be paid her for her separate maintenance (o) (s).

(o) *Lady Oxenden v. Sir James Oxenden*, 2 Vern. 493.

have been the plaintiff, desiring the court to dispose of the fund for the benefit of Lady Elibank, or to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the court, it would have been matter of course to have pronounced on her equity on the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her; for the provision upon her marriage was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation, that by circumstances to occur in his family, there would be an opportunity to do better for her at a future period. The difficulty is, that it is very unusual in point of form; the bill coming on the part of the wife instead of the husband." Declare therefore, added Lord Rosslyn, "that the defendant Montolien is not entitled to retain the plaintiff's share in satisfaction of her husband's debt; but that such distributive share of Lady Cranstown's fortune accruing to the plaintiff as one of her next of kin, is subject to a farther provision in favour of the plaintiff and her children; the settlement made upon her marriage being inadequate to the fortune she then possessed. And let it be referred to the Master to take the accounts, and to see that a proper settlement is made on the plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her."

And in mean time court will restrain husband from assig-
ning. Sed
qu.

It is also observable, that in *Ellis v. Ellis*, (1 Supp. Vin. Abr. 475, pl. 4.) the court entertained a writ by the wife to restrain her husband from assigning or transferring for valuable consideration her equitable property, and granted an injunction, ordering the husband to make proposals for a settlement. And in *Roberts v. Roberts*, 2 Cox's Rep. 422, the Master of the Rolls granted an injunction for the like purpose, in order to prevent the necessity of new parties. But he said he desired to be understood, that he did not make the order under an idea that a purchaser or assignee of the husband for valuable consideration of the wife's property could put himself in a better situation than the husband; and his Honour added, that the more he thought upon the subject the more he was satisfied that such an assignee must be subject to the same equity. But the principle for granting the injunction in the two last cases, says Mr. Roper (1 Rep. Bar. & Eccl. 260.) is very questionable; for if the husband had a right to sell his wife's equitable choses in action, there is no reason why he should be prevented. And in *Pulvertoft v. Pulvertoft*, 18 Ves. 84, Lord Eldon refused to enjoin the husband from selling property of which he had previously made a voluntary settlement, after marriage, upon his wife and children.

Wife entitled to
settlement if
her husband so
treats her as to
compel her to
desert him.

(S) The case was this:—By articles on the marriage of A., with B. her husband, the sum of 6000*l.*, part of her fortune, was agreed to be laid out in lands, and settled on B. for life, then on A. for life, with remainders over in strict settlement. The money was left in the Bank, till the purchase could be made subject to the trusts. A. being obliged to leave B., in consequence of his cruel and unhandsome treatment, filed a bill for the performance of the marriage contract, and to have an allowance for maintenance, and a cross bill was filed by B. to have the money placed out at interest, until a purchase could be made. The ill treatment of the wife having been fully proved, the Court decreed the 6000*l.* to be laid out, with her consent, in a purchase, and settled pursuant to the articles, and the interest in the mean time to be paid to her, so long as she lived separate.—In this case it is observable, that the court deprived the husband of the interest of his wife's fortune, although it was directed by the articles to be paid to him for life. On the same principle were decided the cases of *Williams v. Callow*, 2 Vern. 752. *Watkins v. Watkins*, 2 Atk. 96. *Sleech v. Thorington*, 2 Ves. 562. *Atherton v. Nowell*, 1 Cox. C. C. 229, and *Wright v. Morley*, 11 Ves. 93. These cases proceed on the ground, that the law having given to the husband the personal estate of his wife to enable him to maintain

And it has been settled by a variety of cases, that where property of the wife is in the hands of trustees or in a court of equity, and cannot be attained but in equity, assignees at law, or assignees of the husband's general property, have not a better interest than he has (p); and therefore the court will not extend its arm to give such general assignees any part of the wife's property which they cannot come at without the intervention of the court, unless they offer a consideration by way of allowance out of it for her. Such court considering the property which the husband takes in right of his wife, as in itself a provision for the maintenance of both by a title that gives him and her a joint enjoyment.

Same law if husband, or his assignees sue for wife's property which is in trustee's hands.

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Upon this ground a court of equity refuses its aid to assignees of a bankrupt, to enable them to procure trust money, which they cannot come at, but by application to such court to act against the trustees, unless they offer to make a reasonable and proper provision thereout for her (q).

Same law against assignees of bankrupt.

Thus, where A. married B., who became a bankrupt (r), and at the time of his last examination, he delivered up, with the rest of his estate, a bond which was given to A., in trust to secure the payment of an annuity of 40*l.* a year to A., during the joint lives of herself and another person. She brought a portion of 500*l.* to the bankrupt, and had nothing to subsist on but this annuity, and prayed by her petition, that the assignees might deliver the bond to her trustee, and that the arrears of the annuity and all future payments might be paid to her. And the Lord Chancellor ordered accordingly, considering the creditors as standing in the place of the husband, and not entitled any more than he would have been, in

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Bill of wife for annuity bond detained by her husband's assignees in bankruptcy decreed, unless they will make provision for her.

(p) Vide *Ball v. Montgomery*, 4 Bro. C. C. 339. 2 Ves. jun. 191.

(q) *Bosville v. Brander*, 1 P. Wms. 458. *Ex parte Coysegame*, 1 Atk. 192. *Grey v. Kentish*, ibid. 180. *Jacobson v. Williams*, 1 P. Wms. 383. [*Miles v. Williams*, ibid. 249.] *Worrul v. Marlar*, ibid. 4th edit. 459, n. (1). *Oswell v. Probert*, 2 Ves. jun. 680. *Bardon v. Dean*, ibid. 607. *Freeman v. Parsley*, 3 ibid. 421. *Pringle v. Hodgson*, ibid. 618, [et per Lord Rosslyn, in this latter case, "the assignee at law has a right to the chose in action

of the wife; and the law reduces it into possession. The bankrupt laws give over all that the husband had or could dispose of to the assignees."—This was cited and approved by Sir W. Grant, in *Milford v. Milford*, 9 Ves. 98, who added, "the property is vested by law in the assignees, and the question of survivorship is quite laid aside by the bankruptcy."—Ed.]

(r) *Ex parte Coysegame*, 1 Atk. 227. 1 Co. Bank. Laws, 323.

her and the children of the marriage, it follows, of a consequence, that if he desert her and leave her destitute, or compel her to leave him from cruel treatment or gross misbehaviour, his interest in her personal property will be suspended.

case he was no bankrupt, to the annuity, without making a provision for her.

In this case, Lord Hardwicke seems to have considered [the whole of] this annuity as no more than a fair provision out of the wife's portion (T).

Husband's assignee in bankruptcy, or under deed of trust, entitled to wife's separate estate on making provision for her.

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And the same principle applies to trustees of the property of a person whose wife is entitled to personal property, so predicated, under a general assignment.

Thus, where a sum of money was devised in trust to be placed out at interest (s), and the interest to be paid after the death of the testator's niece S. T., without leaving children to the defendant C. M., during her life, and after her decease the principal to go to her children. S. T. died in the life of the testator, without children. The husband of C. M. being indebted to several persons, made a general assignment to the plaintiffs as trustees of his stock in trade, debts, and *other effects whatsoever* in trust for themselves and the rest of the creditors. Afterwards the plaintiffs filed their bill against the original trustees of the money and against C. M., and her husband praying to be paid the interest and dividends on these trust monies, until they should have been paid their full demands. The question was, whether the plaintiffs were entitled to these dividends without making a provision for C. M. for life. *Et*

(s) *Pryor v. Hill*, 4 Bro. C. C. 139.

As a general rule, wife's provision to consist of half her property, or income.

(T) As to the quantum of provision for the wife in these cases, the usual course appears to be to allow her *half* the property in dispute, as between herself and assignees in bankruptcy. *Brown v. Clark*, 3 Ves. 168. *Pringle v. Hodgson*, ib. 620. *Wright v. Morley*, ib. 121; but whether a different proportion would be decreed against a purchaser for value no case warrants even a conjecture. Indeed, the point itself, that a wife is entitled to a provision against a purchaser, is not yet finally settled, see *postea*, 796, *in notis*. In *Onwell v. Probert*, 2 Ves. jun. 683, where the wife was entitled to the interest only for her life, Lord Rosslyn said, it was not easy to divide an income, for half an income was not a maintenance. Creditors were extremely handsome upon these occasions. It was much better to refer it to them. His Lordship did not like to judge of it. Declare, therefore, he added, "that the interest of the Bank annuities belong to the wife for life; and that a provision is to be made for her, and refer it to the Master for a proposal." Lord Hardwicke, indeed, in *Coysegame ex parte*, 1 Atk. 192, gave the wife, against the assignees of the bankrupt, the *whole* of the annuity belonging to her before marriage. Also in *Vandenanker v. Desborough*, 2 Vern. 96, the Court gave the *whole* to the wife against the assignees. But these cases have not been followed by the modern determinations. Where on a bill filed by the assignees of the bankrupt, to recover money to which the bankrupt was entitled in right of his wife, the usual reference was made to the Master to consider of proposals for a settlement on the wife and children, the Master approved of a settlement of the *whole* property on the wife and children. Exceptions were taken to his report, and *allowed*, and the Master was directed to review his report, *Beresford v. Hobson*, 1 Madd. Rep. 362; and note, the proposal to the Master must be made by the assignees, *Lumb v. Milnes*, 5 Ves. 521.

per, his Honour, the Master of the Rolls. This is a general assignment by W. M. of all his effects to the plaintiffs in trust for his creditors. And it comes to this, whether the assignees are entitled to the interest of the funds for the life of the wife. The assignment, in this case, being equivalent to an assignment in law by bankruptcy, I cannot see why the court should not admit the same equity of calling on the assignees, to make a provision for her. The assignees are not entitled to the annuity without making such provision. If the parties cannot agree, I can only say, I cannot assist the assignees to get it without their making a provision.

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So an assignment of *all* the wife's property to a creditor of the husband, would not be aided in equity, unless some provision were thereout made for her.

Assignment of all wife's property to a creditor of husband's, unaided in equity, unless creditor will provide for wife.

This point occurred in the case of *Jewson v. Moulson* (t). There V. married a lady, entitled under her father's will to one-fifth part of his whole estate, consisting of two freehold houses, &c. which was directed to be turned into money, but made no provision for her by way of settlement. Soon afterwards, V. made an assignment of all the share, which in right of his wife he was entitled to in her father's personal estate, to a bond creditor, and at a subsequent period made a second assignment of his wife's share to trustees, for the benefit of all his creditors in general. During this period, the wife was under age, and the executors did no act to settle, or make any division of the father's personal estate. The question was, whether the wife, who was totally unprovided for, should not have a maintenance secured to her out of her share of her father's personal estate, before it was applied in payment of the bond creditor, and the rest of the creditors of the husband? and Lord Hardwicke said, as to the last of these assignments, it did not differ from the case of assignments of bankrupts; for it was in the case of a failing man, and fell exactly under the same reasoning of an assignment of a bankrupt's effects for his creditors in general; because here he assigned all his right, title, &c. and consequently, it was exactly upon the same footing.

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As to the first assignment to the bond creditor (u), to be sure, that was different from the other, and likewise differed in several circumstances from all the cases decided.

(t) 2 Atk. 418.

(u) Ibid.

*Jewson v.
Moulson.*

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In the first place, here was a mixed fund (x), arising out of real as well as personal estate; for though the father indeed, by his will, directed the estate to be sold and turned into money, yet all the children together, when they came of age, might have said to the trustees of the will, let us take the real estate as it is, notwithstanding the testator directed it to be sold. Besides, the wife was an infant when she married, and likewise during all these transactions; and, consequently, a particular object of the care of that court.

Besides too (y), this was not an assignment of a term for years, or a specific thing, but an assignment at once of all her fortune, and which the husband could not reduce into possession, without the assistance of the Court of Chancery, neither had there been any division made, or even an account taken of the testator's estate, which could bind the parties.

The trustees themselves (z), though willing to have joined with the husband, could not have bound the wife, as she was an infant, and as there was likewise a clause of survivorship in the will; and, therefore, there was no possibility of coming at the fortune, without the aid of Chancery; for that reason, the bond creditor must be presumed to have known all the circumstances of this security, and what the rule of equity was, in regard to provisions to be made for a wife out of her fortune.

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In the present case (a), his Lordship laid a very great weight upon its being an assignment of the whole portion, and said, if he should allow this practice to prevail, it would trip up all the care and caution of the court with regard to infants; for a husband then would have nothing to do, but to take up money of a third person, and though neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, and so defeat the care of the court entirely.

Upon the above grounds (b), amongst others, his Lordship was of opinion, not to allow the creditor to receive the whole fortune of the wife, without making some provision for her. And he recommended, that the parties should come into terms, to which they acceded.

I have stated the most material parts of the argument of the court upon this occasion, as it seems to have acted upon all the circumstances of the case combined together; but it is observable, that the last ground was that upon which the

(x) *Jewson v. Moulson*, 2 Atk. 418.

(y) *Ibid.*

(z) *Ibid.*

(a) *Ibid.*

(b) *Ibid.*

court principally relied, namely, the unliquidated state of the fund.

An opinion has prevailed, that there is a distinction between general and particular assignees of the husband of personal property of the wife in trustees' hands, in respect of the equity of the wife therein; and it has been said, that in the latter case, the wife has no equity to claim a provision against the particular assignee of the husband, out of the trust fund. This opinion seems favoured, by the sentiments thrown out on the subject, by Lord Hardwicke, in the case of *Grey v. Kentish*. In that case (c), A. devised the moiety that he was entitled to, of W.'s estate, to E. C. for her life, and then to E. K. for life, and after her death to such of her children as should be living at her decease. This was afterwards, by a decree of the Court of Chancery, directed to be laid out in South Sea annuities, and to be paid *as directed in the will* (d). The husband of one of the children of E. K. assigned this legacy to B., for securing 150*l.* upon a contingency mentioned in the deed of assignment, *which also recited the decree*. The husband afterwards became a bankrupt, and the contingency, on which his wife was to take, *not having happened* at the time of the bankruptcy, B. *waived his assignment*, and chose to come in as a general creditor, and assigned over the legacy to the assignees, under the commission of bankruptcy against the husband. The petitioner (the daughter of E. K. who was then dead) prayed the South Sea annuities might be transferred to her, she being entitled thereto, under the will. *Et per curiam*. A husband cannot assign *at law* a possibility of the wife, nor a possibility of his own; but this court will, notwithstanding, support such an assignment for a *valuable consideration*, though I do not know *any case* where a person claiming, *under a particular assignee*, has been *obliged* to make *such a provision* as is prayed here. As between the assignees under a commission of bankruptcy, and the wife of the bankrupt, the court has interposed and obliged the assignees to make a provision. What makes this case particular is, that there was a decree which ordered the money to be paid to the usher of the court, and it was also in another respect particular, that this was not an absolute assignment, but in the nature of a security only,

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Wife not entitled to provision against particular assignee of husband. *Semb.* (bb).

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(bb) [See postea, p. 795.—Ed.]

(c) 1 Atk. Rep. 280, et vide 1 Cox P. Wms. 459, where, in the note, the mistake in Atkyns in stating the facts is corrected.

(d) This was a future and contingent interest; the husband died before the contingency; the wife survived, and was let in.

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and was now *come back* into the hands of the assignees of the husband. What then was the equity arising to the wife under the decree? It will neither let the husband, if he remained *sui juris*, or, if he becomes bankrupt, his assignees touch the money, unless they first make a provision for the wife. I will put this case; suppose the husband living, and no bankrupt, and he had paid off the 150*l.* and had died, would the representative of the husband have been entitled? I am of opinion not, as it was in the nature of a pledge, but it would have been the wife's by survivorship, or, if the husband had died without redeeming the estate of his wife, she would have been entitled to have had this estate disincumbered, and the estate would have survived to her. *The particular assignee, having taken with notice of the equity of the wife, and the assignees under the commission taking it subject to the same equity with the particular assignee. I am of opinion it is her property, and therefore shall direct the South Sea annuities to be transferred to her* (U).

And the cases of *Tudor v. Samyne* before-mentioned (e), and *Povey v. Amhurst*, are cited in support of this distinction.

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Creditor obtaining assignment from husband of part of wife's legacy, decreed to be first satisfied, and residue (if any) to be settled on wife.

The facts, in the latter case, were as follow :

A. had, by his will (f), given 1000*l.* to B. whilst sole, afterwards, on her marriage with C., it was agreed, that 700*l.* of this legacy should be applied towards payment of his debts. After the marriage, C., without his wife, assigned the remaining 300*l.* to the plaintiffs, who were creditors likewise, and they brought this bill against C. and his wife, and the executors of A., to have a satisfaction of their debts out of the remaining 300*l.*, and it was decreed, that an account should be taken, and, upon the plaintiffs proving themselves real creditors, and that the assignment was *bonâ fide*, they were to have a satisfaction

(e) *Supra*, 751.

(f) *Povey v. Brown and Amhurst*,

Pre. Ch. 325. S. C. Gilb. Eq. Ca.

80.

Correction of case in text.

(U) Lord Bathurst, C., in *Gayner v. Wilkinson*, 2 Dick. 494, said, this case of *Grey v. Kentish*, was "arrant nonsense," as reported by Atkyns—the report from whence the text is taken. Some of the mistakes are corrected by Mr. Cox, in his edition of P. Wms., see 1 P. Wms. 458, n. (1). Thus, the husband of Elizabeth Kentish is supposed by the report in Atkyns to be the bankrupt, whereas it appears by the Register's Book, that the bankrupt was one Crispe, who married one of the two children of Elizabeth Kentish, and who made the assignment to Barratt, (as mentioned in the report) in the mother's life-time, and Crispe having died before the mother, his wife upon her mother's death petitioned to have her share of the South Sea annuities transferred to her, which was ordered accordingly, notwithstanding the opposition of the general assignees of Crispe. Reg. Lib. A. 1748, fo. 532.

accordingly, and the residue, if any, of the 300*l.* was to be put out for the benefit of the wife.

And Lord Thurlow, in the case of *Worral v. Marlar*, and *Bushnan v. Pell* (g), seems to favour this distinction, for he said that he had considered the several cases upon the subject, and did not find it any where decided; that if the husband made an *actual* assignment by *contract*, for a *valuable consideration*, the assignee should be bound to make any provision for the wife out of the property assigned; but that a Court of Equity had much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for, as to the *latter*, his Lordship's opinion was, that when the equitable interest of the wife was transferred to the creditor of the husband, by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife.

Lord Thurlow was of opinion that wife not entitled to a settlement against husband's assignee for value (gg).
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But it may be observed, in answer to these cases, that in *Grey v. Kentish*, the question arose on a future and contingent interest, which, by the death of the husband, before the contingencies, survived to the wife; the case of *Tudor v. Samyne* being an assignment of a term for years, was governed by the resolution in *Sir Edward Turner's Case*; and the case of *Povey v. Amhurst* (h), was probably determined upon the ground, that the legacy was *then* considered as a *chose* in action, and so recoverable at law by the husband; but it has been of late decided, that this was an erroneous opinion; that courts of law have no jurisdiction over this subject; and that an action for a legacy cannot be supported (x); and the Master of the Rolls, in the case of *Like v. Beresford* (i), denied the authority of this case on that ground.

Observation on *Grey v. Kentish*.

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And although there is no case in print, in which the first point, to which allusion was made by Lord Thurlow, in the before-mentioned cases, has been decided, yet I have great reason to think that this question was determined by Lord Keeper Henley, in the case of the *Earl of Salisbury v. Newton*, *et al.* (k) which came before the court, the 2d of July, 1759. It appears, from the Register's minutes, that the end of the

Reference to unreported case of *Salisbury v. Newton*.

(g) Vide 1 Cox P. Wms. 459, note (1).

(h) Vide 2 Atk. 180.

(i) 3 Ves. 512.

(gg) [The contrary was settled before Lord Thurlow's time, see *infra*, p. 796, in *notis.*—Ed.]

(k) *Earl of Salisbury v. Newton*, [see the note to p. 796.—Ed.]

(X) An action does not now lie by a husband for a legacy in right of his wife, though such an action might have been maintained at one time, per Lord Rosslyn, in *Blount v. Bestland*, 5 Ves. 516.

*Salisbury v.
Newton.*

[795]

bill filed in this case (*l*), was to have the fifth part of the personal estate, and of the money arising by sale of the real estate of John Blewit, deceased, to which William Durham, the husband of the defendant Ann, was entitled in right of his wife, applied towards satisfaction of the plaintiff's debt of 1594*l*. 15*s*. 11½*d*. and interest, and if not sufficient to satisfy the same, to have the real estate of William Durham sold. *Et per curiam*, let it be referred to the Master to inquire what fortune the defendant, Catharine Durham, the widow, is entitled to, either by virtue of the will of James Blewit, her father, or under the articles made antecedent, upon, or after his marriage, and to make her election before the Master, whether she is to take under the will of the father, or under the articles. Let the Master see whether W. Durham, deceased, the husband of the said defendant, Catharine Durham, hath made any settlement or provision for her or her children; and if not, let the Master consider what will be a proper provision to be made, by or out of her fortune, upon her and her children, and the Master is to state the same, with his opinion thereon, to the Court; and thereupon such further order shall be made, relating thereto, as shall be just; and the reference proceeds and gives a variety of other directions. But though, from the nature of these directions, no doubt can be had but that this case must have come on again for further directions, yet, upon an inspection of the Register's Book, nothing further is to be found of this cause.

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But among several manuscript cases collected by the late Mr. Fearn on this subject, and which induced me to inquire after this case, I find the case and judgment thereon stated as follows:

Salisbury.—Trinity Term, 1759. "A married woman being
" entitled to a certain sum of money in the hands of trustees
" or executors, the husband having made no provision for his

(*l*) *Et vide Wenman v. Mason*, (Y), Trin. Vac. 1765, stated 1 Cox, P. Wms. 5th edit. 459, in note.

*Wife entitled
to settlement
against assignee
for value.*

(Y) This case, as stated by Mr. Cox, is long and complicated. It appears, that the husband and his wife assigned her interest in a legacy to secure to A. 300*l*., which A. became liable to pay in consequence of his being surety for the husband in a bond for that sum. Upon the bill of A., against the husband and wife, and the assignees under a commission of bankruptcy which had issued against the husband, for payment of this debt out of the wife's share in her legacy, it was so decreed, subject to the settlement of a part upon the wife and children. 1 Cox's P. Wms. ubi supra.

" wife and children, and being in debt to the Earl of Salisbury, assigns over this money to a trustee of the Earl in trust for the Earl. The husband after dies, without making a provision for his wife and children, and the trustees refuse to pay this money to the Earl, and for which a bill was brought. But the Keeper refused to give him any relief, as no settlement was made by the husband on his wife and children, and the Earl could be in no better case than the husband, who, if he had applied to the Court for this money, the Court would have put terms on him" (z).

Salisbury v. Newton.

(Z) This case has been lately reported by Mr. Eden, and is decidedly hostile to the supposition of the learned author, as expressed in p. 794, who, however, was not without much authority for his opinion. This appears to be the first case which distinctly established the equity of the wife to a provision out of her own fortune, against the particular assignee of her husband for valuable consideration. It was to the following effect:—The defendant, Mrs. Durham, was entitled to the sum of 2000*l.*, as her portion under her father's marriage settlement, or to a legacy of 600*l.* under his will, which was given to her in lieu and satisfaction of her portion. Her husband being indebted by bond to the plaintiff, assigned to Sir M. L., in trust for the plaintiff, all and every thing he was entitled to, in right of his wife, for payment and satisfaction of the said bond, and died without making any provision for his wife and children. The bill was filed against the wife's trustee for an assignment. Et per Lord Keeper Henley:—If the husband himself had come into this court, the court would have compelled him to make a settlement, and his assignee cannot be in a better situation than he himself would have been in. The assignees of a bankrupt have an assignment of his estate by an act of parliament, which is stronger than the present case; and yet if they come here for a legacy or portion due to the wife, the court will take care that a provision is made for her. Many of the cases cited are not cases of a wife unprovided for. It must, therefore, be referred to the Master for the widow to make her election, whether to take under the will of her father, or by the articles; and that the Master may inquire if there is any settlement, and if not, that he may consider of a proper settlement and provision for the wife and children, and that the overplus, if any, be paid to the plaintiff in satisfaction of his bond. *Earl of Salisbury v. Newton*, 1 Eden, 370.

Wife entitled to provision against particular assignee of husband, who, for value, had assigned the whole equitable interest of his wife with other property of his own generally.

In the subsequent case of *Gayner v. Wilkinson*, 2 Dick. 491. S. C. 4 Bro. C. C. 50, n. t, Lord Bathurst, C., said, that particular assignments had sometimes been supported but not generally. No instance, however, appears in the books where a particular assignment has been disallowed. It is probable, therefore, that his Lordship was referring to some manuscript case with which the profession are not acquainted. In *Gayner v. Wilkinson*, ubi supra, the question was, whether a contingent legacy of 2000*l.* given to the wife, and which during the coverture had become vested, should go to the assignees of the husband bankrupt, who died before it was reduced into possession. It is observable, that although the contingency happened during the coverture, yet it did not happen till after the assignment to the assignees of the bankrupt. 4 Bro. C. C. 50. Lord Bathurst said, he had heard of no case, where the question had been agitated between the assignees of a bankrupt and the wife, after the bankrupt's death. The case of *Wenman v. Mason*, before Lord Northington, was not in point. [This case does not appear in Mr. Eden's Reports.] He should consider this question upon the principles of law, and on those which prevailed in the Court of Chancery. Whatever a bankrupt could release, or dispose of, was conveyed to the assignees by the assignment from the commissioners. In *Miles v. Williams*, 1 P. Wms. 249, a bond executed to the wife *dum sola*, was held assignable by the commissioners for two reasons; one, that the husband might assign; the other, that he might release it to the king, to bring it within the statute. There was a difference between an assignee

Assignment in bankruptcy no effect on wife's contingent legacy, which, during coverture, but after bankruptcy becomes vested.

Husband's assignment no bar to wife's equity.
[797]

And in the case of *Pope v. Crashaw* (m), his Honour said, he hoped it would be understood that a husband could not, by assigning his wife's property, bar her of any equity she might have in it: that he should never subscribe to the contrary doctrine.

Husband's assignment for valuable consideration of wife's personal property in hands of trustees, no bar to wife's equity (A).

And in a late case of *Macaulay v. Philips*, his Honour, the Master of the Rolls (n), observing upon this question, said, that "many cases had been before him, which had put him upon the necessity of considering very much the right of the wife; and he was clearly of opinion, the doubt respecting the assignment of the husband, for valuable consideration, of the wife's equitable interest, was not well founded (o), with the

(m) 4 Bro. C. C. 326.
(n) 4 Ves. 19.

(o) Vide supra, [745, in notis.—Ed.]

for a consideration and the assignees of a bankrupt, because a general assignee must sue in his own name; a particular assignee must bring an action in the name of the husband. Therefore if the husband died before it was recovered, the assignee for a valuable consideration would lose all legal remedy, and must come into Chancery for its assistance. Particular assignments had been sometimes supported, but not generally. A court of equity would not strip a widow and children. But be that as it might—in the case before the court, the interest of the wife was not such a legal interest as the husband could assign: he must have come into Chancery. His Lordship then cited several cases, and decreed that the wife's legacy did not pass by the assignment to the assignees.

Wife entitled to provision against purchaser for value.

In a case not frequently noticed in collections of authorities on this head, *Hill v. Atkinson*, at the Rolls, 26th June, 1797, (where the point came on by petition, see Mr. Vesey's n. (d) to 4 Ves. 530) the Master of the Rolls expressed himself thus:—"I have the same opinion I ever had: and the note shews Lord Thurlow could only say, that he did not find it any where decided: that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned. He does not say the assignee has ever obtained the property without doing so. All this court does would be perfectly nugatory, if the husband could go and sell his wife's property. Therefore I do not agree with that opinion." The Master of the Rolls added, that he would put the assignee to file a bill: but it was afterwards compromised. Et vide *Wenman v. Mason*, cited antea, p. 764, of this edit. n. (Y), for a decision similar to that of *Hill v. Atkinson*.

Sir W. Grant's doubt of this doctrine unfounded. Semb.

Notwithstanding the express decision in the two cases of *Salisbury v. Newton* and *Hill v. Atkinson*, that a particular assignee for value must provide for the wife, Sir W. Grant, in *Mitford v. Mitford*, 9 Ves. 100, still considers the question open to discussion; and in *Wright v. Morley*, 11 Ves. 20, his Honour said, the circumstances of that case did not make it necessary to determine the much litigated question, whether the equity of the wife could be barred or affected by the husband's assignment for valuable consideration; but thus much was certain,—that if the particular assignee for valuable consideration were not in a better, at least he could not be in a worse condition, than the general assignees under a commission of bankrupt. Hence, it may be inferred, that Sir W. Grant considered the point as not permanently settled. But it should be observed, that neither *Salisbury v. Newton* nor *Hill v. Atkinson* is mentioned in either of the cases of *Mitford v. Mitford* or *Wright v. Morley*, which engenders a belief, that his Honour was not acquainted with those determinations, at least to the extent which it now appears they may be applied.

(A) "To have a provision for herself and family;" per the learned author in the index to his 4th edition, title *Baron & Feme*.

single exception, perhaps, of a trust of a term for years of land, upon which, perhaps, there might be some doubt: but subject to that he was clearly of opinion, an assignment for valuable consideration would not bar the equity of the wife" (B).

(B) And his Honour added, "It would be strange if it did, since the determinations in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife. It is determined, that the action does not lie; and the reason given is, that it would totally defeat the wife's equity. It would be whimsical then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this court upon the wife's interest would be very singular if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt; and it never was decided, that the husband could by such assignment, or any other means deprive his wife of her equity."

With respect to the difference as to a term of years of land in trust for a married woman, the Master of the Rolls in a subsequent case, *France v. France*, 4 Ves. 528, observed, that there was a distinction, as it might be taken in execution upon a *fiat facies*; but, notwithstanding he had thrown out that doubt in *Macanley v. Phillips*, *ubi supra*, it might not be well founded, as he had not considered the point sufficiently to form an opinion upon it. In reference to the case of the wife's mortgage secured by a term of years, see *antea*, 750, of this edition, n. (K).

The late cases on this subject are, *Mitford v. Mitford*, 9 Ves. 87. *Wright v. Morley*, 11 ib. 12. *Lloyd v. Williams*, 1 Madd. Rep. 450. and *Hornaby v. Lee*, 2 ib. 16.

In *Mitford v. Mitford*, *ubi supra*, a late eminent Judge canvassed this question freely, yet doubted whether the wife's equity would prevail against a particular assignee for value. The circumstances of the case were shortly these:—The wife of the bankrupt was entitled to 1000*l.* after the death or marriage of C. M. In 1784 the husband became bankrupt, and within the year obtained his certificate. In 1789 C. M. married, when the legacy of 1000*l.* became due to the bankrupt's wife; in 1790 the husband died. The bill was filed by the trustee of the legacy, to have the claims of the assignees and the widow ascertained. The question was, whether the widow's right of survivorship would prevail against the assignees, who had not recovered possession before the death of the husband? Sir W. Grant, M. R. after stating the case, observed, that the bill was filed by the trustees on the opposite claims set up by the widow of the deceased bankrupt and his assignees. The widow contended, that as she had outlived her husband, who never reduced the legacy into possession, she was entitled by survivorship. The assignees stated, that the bankrupt's wife had a settlement made upon her on her marriage, so that the bankrupt became the purchaser of her fortune; and therefore they submitted, whether they were not entitled to the whole of the money: but they contended, that at all events they were entitled to it, subject to a proper settlement to be made upon her. The settlement stated to have been made by the bankrupt on his marriage did not appear, and the mere fact of there being a settlement, his Honour said, by no means proved that the husband became a purchaser of all the fortune that might afterwards come to his wife. The settlement appeared to be in consideration of her fortune, as specified and described in the deed itself; part of which was settled and part paid to the husband. So he could not be considered a purchaser of any thing more than the fortune his wife then had. If then the husband were no purchaser, as Sir W. Grant thought he was not, the trustee of the legacy had no claim whatever; the question then was entirely between the assignees and the wife. That question depended on the effect, which an assignment under a commission of bankruptcy had on the choses in action, or equitable interests of the wife of the bankrupt. Between a particular assignment for valuable consideration, and an assignment by operation of law, such a distinction had always been made, that the effect of the one was not necessarily to be inferred from

Husband cannot deprive wife of her equity to a provision.

Lord Altonley's doubt as to wife's trust term.

Late cases.

Mitford v. Mitford, with Sir W. Grant's luminous judgment.

Settlement no proof that husband is a purchaser.

Particular assignment for value, and an

*Deposit of
deeds belonging
to wife's mort-*

A promise by a husband to assign his wife's mortgage as a security for a debt, accompanied with a lodgment of the

*assignment in
bankruptcy dis-
tinguished.
Analogy be-
tween rules of
law and equity
as to wife's
right of survi-
vorship.*

that produced by the other; and it was only where the husband was dead, that the question between the wife's right by survivorship, and the right of the assignees under the commission, could arise.

"What interests survived to the wife in equity was in general determined by analogy to the rules of law. As at law her choses in action, not reduced into possession by the husband, survived to her, so her equitable interests in the same case survived to her in equity. But there were some legal interests which did not admit or stand in need of being reduced into possession: being in possession already, and not lying in action; as terms for years, and other chattels real; of which the legal title was in the wife. They would survive if no act were done by the husband: but he might assign them; and such assignment would pass the legal interest, whether with or without consideration. The analogy was followed in equity. Equitable interests of the same description might be transferred in the same manner. Therefore in *Lord Carteret v. Paschall*, 3 P. Wms. 197, an interest in the nature of an equitable estate was bound by the voluntary assignment of the husband. With respect to choses in action, they were not assignable at law; consequently the husband's assignment could not prevent their legally surviving to the wife. In strict analogy, therefore, equitable interests, of the nature of choses in action, ought not to be affected by his assignment. But in equity a distinction seemed to have been made between a voluntary assignment and an assignment for valuable consideration. The wife surviving was not bound by her husband's voluntary assignment. That was determined in *Burnett v. Kinnaston*, 2 Vern. 401, (supra, 776,) a case which had always been adhered to. But by an assignment for valuable consideration, it was said she would be bound both as to choses in action and equitable interests. *Bates v. Denby*, 2 Atk. 207. *infra*, 798.

*Voluntary and
valuable assign-
ment distin-
guished as to
wife's survivor-
ship.*

*Purchaser
sometimes put
in a better si-
tuation than
his vendor.*

"Supposing this doctrine to be established," continued his Honour, "the question then would be, whether an assignment in bankruptcy was of the same nature, and produced the same effect as an actual assignment for valuable consideration? It might seem strange that a man should in any way be able to transfer to another a larger or better interest than he had in himself. The husband's interest in his wife's chose in action, or equitable interest, was only a right or power to reduce it into possession. But what was supposed to pass to an assignee for valuable consideration was the absolute right to the property, wholly freed from her contingent right by survivorship. If such were the rule, it arose from the favour which a court of equity had always shewn to such a purchaser, and it operated in many cases to put him in a better situation than the party from whom he derived his title. But was an assignee, under a commission of bankruptcy, placed in a different situation from that of the bankrupt himself? Sir W. Grant had always understood the assignment from the commissioners like any other assignment by operation of law, passed his right precisely in the same plight and condition as he possessed them. Even where a complete legal title vested in them, and there was no notice of any equity affecting it, they took subject to whatever equity the bankrupt was liable to. This shewed they were not considered purchasers for valuable consideration in the proper sense of the words. Indeed a distinction had been constantly taken between them and a particular assignee for a specific consideration; and the former were placed in the same class as voluntary assignees and personal representatives. In *Worral v. Marlur*, ubi supra, Lord Thurlow said, a court of equity had much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for as to the latter, when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject to precisely the same equity with respect to the wife; and accordingly, though it had been much agitated, and was not then perhaps perfectly determined whether a particular assignee were liable to make a provision for the wife out of her fortune, [sed vide as to this, p. 765, of this edit. n. (Z)], it had been long settled, that assignees under a commission of bankruptcy, coming into a court of equity

*Assignment in
bankruptcy
passes rights
of bankrupt in
same plight as
he possessed
them.*

*Whether parti-
cular assignee
liable to make
provision for
wife. Qu.*

deeds, although no assignment thereof be actually made, will be such a disposition of it in equity as will be good against the wife *pro tanto*.

gage by husband as a security for his debt, with a

to reduce the interest of his wife into possession, were bound to make such a settlement as the husband would in the same case have been compelled to make.

"But if the assignment had the effect of reducing the wife's interest into possession, how could this equity ever have prevailed? Out of the property which the husband had reduced into possession, no settlement could be compelled. If the assignment therefore put the assignees into possession, it would completely extinguish all claims of the wife; as the possession of the husband himself certainly did. They ought on that principle to be considered as coming into equity to claim what had by the assignment ceased to be a trust for the wife, and become wholly a trust for the creditors. But the court considered the assignment as doing nothing more than to place the assignees in the room of the husband. So far from treating the assignment as equivalent to possession, it was upon the very ground, that the assignees wanted its assistance to reduce the property into possession, that the Court of Chancery imposed on them the condition, on which alone it would have assisted the husband to obtain the possession. It seemed to Sir W. Grant that the decisions in favour of the wife's claim by survivorship, were most consonant to acknowledged principles with regard to the operation of assignments under the bankrupt laws."

Rule that assignees in bankruptcy must provide for wife, considered.

His Honour then cited the several cases on this head (which for the most part have been previously enumerated), and continued thus:—"The case of *Grey v. Kentish*, is not precisely the same in circumstances as the present; for there the husband died before the tenant for life of the legacy, of which the wife had the remainder; and consequently there was no period of his life, at which it was in the power of him or his assignees to have reduced it into possession. In *Bates v. Danby*, 2 Atk. 207, and *Hawkins v. Hobyn*, ib. 549, Lord Hardwicke held, that even a possibility of the wife might be assigned by the husband for a valuable consideration. It must therefore have been, because the assignees did not claim under an assignment of that description, and not because the interest was not assignable, that the claim of the widow prevailed. In *Gayner v. Wilkinson*, the tenant for life died before the bankrupt. In that case therefore, as in this, the interest of the wife vested in possession before the husband's death. But that circumstance was not held to make any difference in favour of the assignees." On the whole, Sir W. Grant was of opinion, both on principle and on authority, that Mrs. Mitford, having survived her husband, was entitled to the legacy of 1000*l.* with the dividends thereon, from the time of her husband's death; and that the same ought to be transferred and paid to her by the plaintiff, the surviving trustee. The decree was accordingly.

Conclusion of judgment in Mitford v. Mitford.

Wife's possibility assignable by husband for value.

The cases next in order are those of *Wright v. Morley*, 11 Ves. 12, and *Lloyd v. Williams*, 1 Madd. Rep. 450. The former has been noticed in a preceding page, see ante of this edition, p. 796. And the latter will be mentioned in the sequel of this note.

In *Hornaby v. Lee*, 2 Madd. Rep. 16, the husband and wife assigned a reversionary interest of the wife in certain trust stock, as a security for the payment of an annuity granted by the husband. The husband afterwards took the benefit of the Insolvent Debtors' Act, and a general assignment on that occasion was made of his property. The person on whose death the wife was to take died, and then the husband died without having done any other act to reduce the stock into possession: and it was held, that the wife was entitled by survivorship to the stock, against both the particular and the general assignee. Sir T. Plumer, V. C. observed, "independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good? The husband has a right to his wife's *chose* in action, provided he reduces them into possession. Is a deed, assigning a reversionary interest, a reduction of it into possession? It is impossible, actually, to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? The assignment puts the assignee of the husband, in the same situation as the husband; and if the husband survives the wife, the assignee is entitled to the property; but here the

Wife's contingent reversionary interest in stock not reduced into possession by assignment in insolvency.

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promise to assign same,
binding on wife
to extent of
debt.

Thus, where D.'s wife, one of three sisters entitled to their brother's personal estate, who died intestate, and administration was granted to two other persons, with the three sisters and their husbands (p); one of the administrators came to an agree-

(p) *Bates v. Dandy*, 2 Atk. 207.

Of childrens
equity to a pro-
vision.

husband died before the wife and the assignee, the assignee therefore is not entitled to the property. This is the manner in which this case strikes me upon principle. According to *Mitford v. Mitford*, it is clear, that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the *Insolvent Debtors Act*; nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woodlands v. Crowcher*, is strong to show the insufficiency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority, the plaintiff is entitled to this money."

In these cases the wife had the option not to have any settlement made, but if a settlement is ordered to be made, it is always directed for the benefit of the wife and children. *Murray v. Elibank*, 13 Ves. 6, 7. It was formerly doubted, whether children have any substantive and independent right to claim a settlement out of the property of their mother, if a settlement had not been directed during her life-time, but if there had been a decree for a settlement on the wife and children, and the wife had done nothing to waive the equity and died before the report; the children were always deemed entitled to be participators in the provision. *Murray v. Elibank*, *supra*. S. C. 10 Ves. 84. *Macaulay v. Phillips*, 4 Ves. 19, 20. *Becket v. Becket*, 1 Dick. 343. *Rose v. Jackson*, 2 ib. 604. So if the husband die after a proposal for a settlement by him, the children, it has been held, are entitled to have it carried into effect. *Gardner ex parte*, 2 Ves. 672. In *Scriven v. Tapeley*, Amb. 509; S. C. 2 Eden Rep. 357; Lord Northington said, the equity of compelling settlements first arose upon the husband's coming into equity for assistance. It was *personal* to the wife, and if carried further, would be attended with ill consequences to creditors. There was no case where the court had refused assistance to the husband, after the death of the wife upon the terms of his making a provision for the children; and thereupon his Lordship reversed a decree of Sir T. Clark's, where, after the death of the wife, his Honour had ordered her husband to make provision for an only daughter.—A case involving the same point, shortly afterwards came before Sir T. Sewell, M. R., and notwithstanding the reversal of the former decree at the Rolls, it appears from the report, that Sir T. Sewell acted in direct opposition to Lord Northington's opinion. See *Cockrill v. Phipps*, 1 Dick. 391. The point has lately been re-considered by the Vice Chancellor Sir T. Plumer, who, after a review of all the cases, decreed that the child of a feme covert legatee, has no equity to insist on a settlement, after the death of the mother, unless there is a contract or a decree for a settlement, in the life-time of the mother. *Lloyd v. Williams*, 1 Madd. Rep. 450. And his Honour stated the case of *Cockrill v. Phipps*, from the Register Book, whence it appears, that Mr. Dickey's report is a complete mis-statement, and that the whole transaction was foreign to the question under consideration.

They have none
after their mo-
ther's death.

Summary of
points.

To sum up a few of the leading rules on this subject, it may be observed, that the wife's equity to a provision, applies only to *equitable* property of the wife, that is, to such as is vested in trustees, or to such as cannot be obtained by the husband or his assignees without recourse to the jurisdiction of the Chancellor: for instances of which, see 1 Madd. Ch. 480, 481. But personal property in the hands of trustees, settled on the wife with the privity of the husband, or by third persons without his privity for the wife's separate use, is exempt from the husband's debts and beyond his power, *Lockyer v. Savage*, 2 Str. 947, and see *Brown v. Clark*, 3 Ves. 168. To such property, consequently, the doctrine is inapplicable. If a man, in consideration of his marriage and such portion as his intended wife is or may be entitled to, makes a settlement on her by way of jointure, then if any thing

ment to divide the personal estate into thirds, a third to be allotted to each; a memorandum under the account was signed by all; two mortgages, one in fee and the other for a term, each for 150*l.* were allotted to D.'s wife; the legal interest was not assigned, but by the memorandum was agreed so to be. Before any assignment, D. borrowed 200*l.* of the plaintiff on note, and by agreement under note took notice that he had, the better to secure the 200*l.* left two mortgages with him, which he was entitled to, and promised forthwith to assign. Be-

accrues due to the wife during the coverture, the husband will be entitled to it as a purchaser. But if it be not actually expressed, that the settlement was made with a view to comprehend all accessions of fortune, nothing less than the most *clear implication* that it was so intended, will take away the wife's right to a provision from the assignees. And if the wife were an *infant* at the time of the marriage, even an express declaration, that the settlement was in consideration of future accessions of fortune, will not, it has been thought, bar her of a provision from the assignee, in respect of equitable property which has unexpectedly devolved on her after the marriage, and which could not be in contemplation of the parties at the time of entering into the settlement made by the husband. See *Atherley on Sett.* 304. If, therefore, on the other hand, the settlement on the wife be in consideration of her present portion or fortune only, without reference to future acquisitions and property accrues to her during the coverture, which is not reduced into possession by the husband in his life-time, it will survive to the wife in equity as well as at law. *Garforth v. Bradley*, 2 Ves. 677. But the general assignment in bankruptcy will reduce these future acquisitions into possession for the benefit of creditors (see *antea*, 777). Such assignment, however, operating only in equity as a release of a chose in action, the wife will be entitled to a provision for herself and family, and the assignees must make a proposal to be approved of by a Master in Chancery. And as a general rule it may be laid down, that the wife will be entitled to a settlement from her husband's assignees in every case where the husband has not acquired an *absolute* right to her equitable fortune, and whatever be the *nature* of the equitable property will make no difference; for the wife will be equally entitled to such settlement, whether it consist of a gross sum of money—the interest of money—money to arise from the sale of lands—the rents of estates—of an annuity—or, in short, of any other species of property whatsoever. And she will be entitled to a settlement, notwithstanding a part of her fortune may have been settled on her at her marriage; nor will the circumstance of her being in possession at the time of the marriage, of the very property in respect of which she claims a further settlement, take away her right to such settlement. But it is apparent she can only be entitled to a further settlement where the first does not, either expressly, or by necessary implication, give the residue of her fortune to her husband. And if the husband makes a settlement upon his wife, in respect of a certain specified part of her fortune, she will be entitled to a further settlement, against his assignees, in respect of that part of the residue which consists of equitable property; and the wife will also be entitled to a settlement, although the children of the marriage may be provided for *absolutely*. *Pryor v. Hill*, 4 Bro. C. C. 138, Belt's edit. But by the rules of court, the wife will not be entitled to a provision where the property is under 200*l.* or 10*l.* in annual payment. See *Beames' Ord. Chan.* 464.

As to the bearing of this doctrine on a particular assignee, see *antea*, 765, of this edit. n. (Z). With reference to the equity of the children, see the former part of this note. And in regard to the quantum of the provision when granted, see p. 758, of this edit. n. (T). This subject is treated of by the following writers:—Mr. Christian (*Bkt. Laws*, 488), Mr. Maddock (1 Tr. Eq. 482), Mr. Roper (1 Bar. & Feme, Ch. 7. *passim*, and 1 Tr. Leg. 379), Mr. Fonblanque (1 Tr. Eq. 97), Mr. Atherley (Tr. Sett. 300), and Mr. Thomas (3 Co. Litt. 310).

General Repertorium.

[799]

fore any thing done, D. died; the plaintiff's bill was brought against the wife of D., D.'s administrator, and the mortgagors, to be paid his 200*l.* and interest, or to foreclose the mortgages. It was argued on behalf of the wife, that the mortgages were her *choses* in action; and, not having been assigned by her husband, survived to her, or, at least, that she was entitled to them on paying the plaintiff's debt. The administrator of the husband insisted, that in equity what D. had done amounted to an assignment, and that he was entitled to redeem the plaintiff. But it was adjudged, that the agreement amongst the three sisters, and the separating the mortgages from other parts of the estate, was an appropriation of them to D. and his wife, and that D.'s heir and administrator were trustees for D. and his wife in the two mortgages (c): that D. being entitled in right of his wife to the trust of these mortgages, had a power to assign them for his own use: that leaving them with the plaintiff, and giving his note, promising he would procure them to be assigned, amounted in equity to a disposition of them for so much as to satisfy the debt to the plaintiff, but not for more. For though *he might* have disposed of the whole in the manner he did, *his intention* was only to secure the plaintiff's debt, which being done, the mortgages belonged to the widow as her *choses* in action, and not to the husband's administrator: that although one of the mortgages was in fee, it made no difference; for a husband might dispose of the wife's mortgage in fee, as well as of her mortgage for a term (D).

No particular form requisite for the assignment of a *chose* in action.

[800]

And in these cases of assignments of *choses* in action, no particular forms are necessary to be followed; for the principle which governs them is, that the transaction amounts to an agreement for a valuable consideration before hand, to lend money upon the faith of being satisfied out of the fund; and to give effect to it, courts of equity, wherein the assignment of a *chose* in action is admitted, consider it as amounting to an assignment of so much of the debt, to effect which any words or acts evincing the intent of the parties will do, and no particular words or acts are necessary thereto. Thus if a mortgagee were to receive the money due on a mortgage, and there was

Mortgage appropriated for legacy, latter not reduced into possession.

(C) But a legacy to a married woman, was considered insufficiently reduced into possession by an appropriation, by the executrix, of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. *Blount v. Bestland*, 3 Ves. 515.

(D) That the husband's agreement to assign his wife's chattel interest is equivalent to an actual disposition of it. See *antea*, 746, of this edition, in the text.

written on the back of it, "whereas I have received the principal and interest from such a one; do you, the mortgagor, pay the money to him;" this would amount to a valid assignment in equity, and the mortgagor could not pay the money to the mortgagee without making himself liable to the assignee, because he would have paid it with full notice of the assignment for valuable consideration (E).

Where a tradesman having, *after marriage* (g), purchased a term for years to himself and his wife, and the survivor, and the executors, administrators and assigns of such survivor, for the residue of the term, mortgaged it without the wife's joining, with a proviso, that if the husband or wife, or either of them, or their or either of their executors or administrators, should pay the mortgage-money and interest at the day, then the mortgage should be void; and that until default of payment, the husband, his executors and administrators, should quietly enjoy. Seven years after he died in debt, leaving his wife executrix, and the money unpaid. The question was, whether the equity of redemption of this term was assets for the payment of the husband's debts, or it should go to the wife as survivor? And it was held by the Master of the Rolls, that the settlement on the wife, being made after marriage, was a voluntary conveyance; that being only a term for years, and consequently always in the power of the husband to forfeit or aliene, the mortgage was an alienation. For, though if the mortgage-money had been paid before the day, the mortgage would have been void, and consequently all things would have been *in statu quo*; yet the mortgage being forfeited, the equity of redemption was now become a creature of equity; and it being in the case of creditors, and the redemption given, as well to the executors of

Husband after marriage purchases term to himself and wife, then mortgages alone. Purchase, a voluntary settlement; mortgage afterwards a good alienation, and equity of redemption, assets (r).

[801]

(g) *Watts v. Thomas*, 2 P. Wms. 364.

(E) But on this ground a formal assignment should seldom be dispensed with; for it is clear that by an indorsement merely, the mortgagee will not be divested of all his legal and equitable estate and interest in the premises. The consequence is, that on a future sale his concurrence will be necessary; and, in the case of a mortgage, he will retain the legal estate, which he may assign to a second mortgagor, and so debar the assignee of his remedy by ejectment. See further, *antea*, 24, of this edition, in *notis*, and Appendix, No. IX.

Formal assignment recommended.

(F) This case has been noticed before, see *antea*, 290, of this edit. in the text. That a voluntary settlement is not binding on a mortgagee or purchaser even with notice, see *antea*, 655, of this edit. n. (D); and as to a mortgage in the joint names of husband and wife, see *antea*, p. 684, of this edition, in the text.

- [802] the husband as to the executors of the wife, and the last proviso being, that the husband, his executors, &c. might enjoy till default of payment, he decreed that the equity of redemption of this term should be assets.

[803]

CAP. XVIII.

OUT OF WHAT FUND MORTGAGES ARE TO BE REDEEMED (A).

*Introductory
observations.*

THE question, out of what fund mortgages are to be paid, must be decided by ascertaining the precise nature of a debt on mortgage, which will necessarily lead to the developement of the fund on which it is chargeable.

[804]

From the cases to be met with in the books upon this subject, as they relate to mortgages in particular, a man would be induced to imagine that incumbrances of this kind stood upon a distinct ground, and did not fall under the general provisions of the law, respecting the payment of debts; but that arises from the circumstance, that many of these cases were decided at periods, when the nature of a mortgage debt was not thoroughly understood. Since that has been ascertained, there is, generally speaking, very little difficulty in fixing upon the fund, which ought to be liable to pay off mortgages.

*Mortgagor
must pay money,
though
estate be in-
sufficient.*

It has long been holden, that a mortgage (a), whatever be the form of the security, whether it be accompanied with, or be without, a covenant or bond for payment of the money borrowed, being in the abstract and intrinsically no more than a contract for a *borrowing* and lending, is only a debt, and the estate mortgage is a pledge by way of additional security for

(a) *Maynell v. Howard*, Pre. Ch. 61.

(A) It should be premised, that the subject of this chapter relates principally to the mortgagor; for as to the mortgagee, it is obvious that he, having a mortgage and also a bond or covenant, may resort to either the real or personal estate of the mortgagor at his option. The court however may settle on which fund the debt shall ultimately fall, and the consideration of that point is the object of the present division.

the money borrowed; and, on that ground, the mortgagor is bound to make good the money, although the land proves a defective security (B).

A debt is a personal duty, whereby a right to a certain sum of money is mutually acquired and lost.

Debt, its nature and kinds.

Debts are of several kinds, usually divided into debts of record, debts by specialty, and debts by simple contract.

The first and last of the divisions are not material to the discussion of the present question (C); I shall therefore confine my observations to that division, which includes debts by specialty, with the precise nature of which, so far as applies to the extent of the obligation they impose, and the subjects on which they attach, the reader must be made acquainted, in order clearly to understand the *principles* upon which we must decide, out of what funds *prima facie* mortgages, *qua* such, are to be paid.

[805]
Specialty debts the subject of this chapter.

Debts by specialty, or special contract, are such, whereby a sum of money becomes, or is *acknowledged to be*, due by deed or instrument *under seal*, such as by deed of covenant, by lease reserving rent, or by bond or obligation (b). Debts upon mortgage likewise fall under this denomination; for mortgages are made by deeds or instruments under seal, in which the loan is *acknowledged*. Such debts by specialty, in regard that they were confirmed by special evidence under

They are debts under seal, and create no lien on real estate in debtor's life-time.

(b) The recital of a debt under hand and seal has been held to be no specialty debt, although recited in a deed (D). 1 Ves. 313.

(B) And although there be no covenant for the payment of the same. *Cope v. Cope*, 2 Salk. 449. So per Lord Thurlow, in *Ancaster v. Mayer*, 1 Bro. C. C. 464, if a man mortgage his estate without covenant, yet, because the money was borrowed, the mortgagee will become a simple contract creditor, et vide S. L. postea, 927.

Mortgagee a simple contract creditor as to debt alone.

(C) *Sed quare* as to the latter division, since the mortgagee may, if he choose, consider his debt a simple contract debt; vide last note. But if he prefer giving it that name amongst other creditors, he must, it is presumed, relinquish his security for the benefit of those creditors. See *Cope v. Cope*, 2 Salk. 450.

(D) The case to which the learned author here refers, is that of *Lacam v. Mertins*, 1 Ves. 313. S. C. on other points, 3 Atk. 1. and 1 Serj. Wils. 34. Mrs. Hay in her husband's life-time levied a fine of her estate for the purpose of making it subject to a debt of 2000*l.*, which had been contracted by her husband. After his death she borrowed a further sum of 400*l.*, and by an indorsement agreed that the estate so charged should stand pledged with this 400*l.*, and not be redeemed without payment of both sums. Lord Hardwicke said this was a case for which the court never would strain, however liberal they were in such cases in the construction for creditors; and he said it was material to observe, that in this case it was the husband's debt; and the intent was not to change the nature of it, and to make it the wife's debt, for it was only recited in the deed; and the recital of a debt under hand and seal had been held not sufficient to make it a specialty debt, for it must stand on its own force; and his Lordship had known it so determined by Sir J. Jekyll.

Recital of debt does not make it a specialty.

[806]

real, were ranked in a higher degree than simple contract debts. But whilst the debtor and creditor, and the debt, continued *in statu quo*, no material distinction followed from this superiority, in respect of the fund on which it was chargeable. The advantages in point of proof, arising from the instrument, constituted all the difference; for whether the debt commenced by specialty or simple contract, still it amounted to no more than a personal duty; it gave no lien upon the debtor's estates.

Nor after his death, unless heir be specially named; but being personal duties executor bound, though not named.

[807]

Real estate exempt at common law from execution for personal duty.

But when the debtor died, then the specialty creditor derived an essential and immediate benefit from the superior degree of his debt; because the representatives of the debtor were bound to class the debts according to their rank, *viz.* as debts of record, debts by specialty, and debts by simple contract, and to apply the funds, appropriated by law to the payment, in that order, until each class was satisfied; so that debts of an inferior degree could not be paid, until debts of a superior degree had been first discharged. These two circumstances of greater convenience of proof against the debtor, and priority of payment, where the matter was adjusted by his representatives, out of the goods and chattels of the deceased (which being the security creditors depended upon, were liable in the hands of the executors or representatives of the debtor, as well as in the hands of the debtor himself) seem to have constituted the principal features, which distinguished a specialty from a simple contract debt; for, at common law, there was no execution of land for a *personal duty* against the owner, unless in two cases (c); the one in the case of the king by his prerogative, which entitled him *ab origine regis*, to execution of body, lands, and goods; the other, in the case of the heir, if specially named in the instrument, *where otherwise the debt would have been lost*. But a specialty did not bind the heir by virtue of its *intrinsic superiority* or force, but charged him merely as comprehended in the contract, where he was included therein by express words (d); for the heir was not, in respect of the lands having descended to him merely, chargeable for any debt or wrong, or trespass of his ancestor, though the executor was, so far as he had chattels or assets, and *that notwithstanding* he (the executor) was not named in the contract.

Origin of this exemption.

This exemption of the land from being liable to answer the personal contracts and engagements of the tenant, was one of the accidents incidental to the introduction of the feudal law,

(c) Vide 2 Inst. 19. Magna Charta, (d) Dyer, 371 a. pl. 25. cap. 8.

which protected lands from all ordinary process, in order that the tenants might be the better able to answer the feudal duties to the lord, these being the life and support of that kind of government. And as the land was not originally liable to such personal duties in the hands of the ancestor, so neither was it liable in the hands of the heir, if he was not comprehended in the contract, and bound expressly by the act of his ancestors, whereby he might be made debtor in respect of assets.

[808]

But at common law (e), from the time of Edward 2d, to that of Henry 4th, where the ancestor bound himself and his heirs expressly by specialty, the obligee, *if the executor had not assets*, might have had an action of debt against the heir, and, on judgment, became entitled to a special writ (f), whereby *all* the lands, descended to the heir, were to be delivered in execution to the debtee, who had recovered, which was a writ grounded upon the common law, and not on any statute. However, at that period, the heir, though named, was not chargeable, if the executors had assets; for the land still remained, even at law (g), a favoured fund, being considered only as a *dernier* security for a debt, to which the heir became subject, in respect of the contract, to the performance of which he was bound, not as debtor, but in privity, as heir, in respect of real assets descended, if the personal assets failed; for, by the common law, if the heir, before an action brought against him, had aliened the assets, the obligee was without any remedy, which would not have been the case, if the debt had been considered as due from him independent of assets. And though the action in such case was in the *debet et detinet*, and not in the *detinet* only, as in the case of an executor, that seems to have arisen from the circumstance, that the right in such case would have been destitute of a remedy, unless such writ could have been maintained, there being no other provided applicable to this case.

Down to Hen. 4. land a favoured fund, and heir, though bound not liable, if executor had assets.

[809]

Therefore, down to the time of Henry the Fourth (h), if the heir was sued on the specialty of his ancestor, in which he was also named, and with which he was chargeable in respect of

But now (if heir named) specialty creditor may elect to sue either heir or executor (E).

(e) Poph. 151. Plowd. Com. 441. Dyer, 81. 3 Co. 11 b. 12 *ibid.* 2.

(g) 27 E. 3. 82, pl. 23.

(f) Dyer, 373, pl. 14. 2 Roll. Abr. 71. *Ibid.* pl. 2.

(h) Fitz. Abr. Tit. Dette, pl. 175.

6 H. 4. 2. b. pl. 14.

(E) This is good law. In *Haight v. Langham*, 3 Lev. 303, 2d edit. it was said that the obligee may charge the heir or executor at his election, or both of them, if one is not sufficient; but it is added, "debt lies not against the heir till the sheriff returns that the executor has not assets; and see

Mortgagee may proceed against heir or executor, but heir

- [810] real assets descended, he might have pleaded assets in the hands of the executor the day of the writ purchased. But the law seems to have been altered in this respect in the time of Edward 4 (i), for per Pigot, 4 E. 4. 25, if a man make an obligation to me, and bind himself, his heirs, and executors, and die, I may elect to sue the heir or executor, *at my pleasure*, and Mich. 10 H. 7. 8. b. where, in debt against the heir, he pleaded "assets in the hands of the executor, the day of the writ purchased." Vavisor said, such plea would not be good (k). A similar decision was also made on the like plea, in the 3d and 4th of Elizabeth. And no instance has occurred to me in later times, wherein assets in the hands of the executor have been considered as a good plea for an heir in such suit (l); but the debtee has been ever since considered as having an election, where the heir is chargeable, to sue him, or the executor or administrator, at law, to recover his specialty debt from the one or the other as he pleases, without regard to the executor or administrator having or being without assets.
- [811]

Same law acknowledged by subsequent statutes.

The statute of Westminster also, which gives the *elegit* (m), subjects the lands and goods indifferently to the execution of the creditor.

And the statute of Acton Burnell (n), and the statute of merchants, in like manner direct that the lands and the goods of the debtor shall be delivered to the merchant by reasonable extent, to hold them until such time as the debt is levied.

(i) 4 E. 4. 25. 7 E. 4. 13. a. 14 H. 8. 10. b. Poph. 151. Andr. 7, pl. 13. S. C. Benl. 162.

(k) Vide Dyer, 204. b. pl. 2. 1 Andr. 7. [The case to be found by this reference seems to be the same

as that reported by Popham and Bendloe. The name of the case in Dyer, is *Quarles v. Capell*.—Ed.]

(l) 3 Bac. Abr. 25.

(m) 13 Edw. 1. Cap. 18.

(n) 11 Edw. 1. 13 Edw. 1. stat. 3.

entitled to be reimbursed out of mortgagor's personal estate.

2 Inst. 233. and 7 E. 4. 13 a. for an opinion that debt does not lie against the heir, if the executor has assets." This, it is presumed, was quoted to shew that originally the obligee had not his election against the heir or executor, and not as militating against the proposition previously advanced. The doctrine conferring a discretionary power on the obligee to sue either the heir or executor, was acknowledged by Lord Hardwicke in *Gulton v. Hancock*, 2 Atk. 435. S. C. postea, 905. His Lordship there remarked, that the mortgagee might take his remedy against the executor, or against the heir at his election; but it was likewise to be remembered, that this election of the mortgagee would not determine which fund ought properly to be charged, nor vary the right as to those funds; and if the mortgagee or obligee were to proceed against the heir, the heir would be entitled to be re-imbursed out of the personal estate, provided there were assets in the executors hands sufficient for that purpose. *Armitage v. Metcalf*, 1 Ch. Ca. 74; et vide postea, 814. But the real assets of the mortgagor will not be subject to the mortgage if there be no covenant or bond wherein the heir is specially named. See postea, 927, in notis.

The statute staple indeed adopts the old notion (o); charging the lands only in the event of the goods and chattels of the debtor proving deficient.

And the subsequent statute of William and Mary, made to prevent any wrong and injury to creditors by alienation of the lands descended to the heir (p), or from the ancestor's devising away the lands, makes no provision as to any priority, in pursuing the general assets of the debtor for satisfaction of the debt.

[812]

But although the common law, after lands became subject to execution for debt, seems to have relaxed in favour of the creditor, so far as to let him in indifferently on the real or personal fund at his election, it provided no means of adjusting how the burden should be borne as between the heir or tenant, and the personal representative of the debtor. Here therefore equity stepped in, and, considering the common law remedy against the heir, and the statuteable provisions against the land, as instituted only for the sake of preventing the creditor from a total loss of his debt, and that, therefore, the ancient common law notion furnished the true principle on which an adjustment ought to be made between the heir and executor (q), founded an equity upon the common law notion, and thereupon substituted the heir in the place of the creditor, and fixed the debt ultimately on the personal assets, if sufficient, making the personal, as between the heir and executor, exonerate the real estate (r)(g); in which respect that Court acted in conformity with one of its principles, namely, that in all cases when it is a measuring cast between an executor and an heir at law, the latter in equity shall have the preference.

But though creditor may sue heir or executor, equity has fixed debt ultimately on personal assets, if sufficient (s).

[813]

Therefore, although a creditor by speciality may (at law) sue either the heir or executor, and shall have the benefit of

Ergo, executor must exonerate heir, if he have assets.

(o) 27 Edw. 3. stat. 2. cap. 1.

(q) 2 Freem. 204, 205. 208. Hard.

(p) 3 & 4 W. & M. cap. [14. s. 5.

512. 1 Ch. Ca. 74.

Et vide 1 Selw. N. P. 585, 5th edit.

(r) *Edwards v. Warwick*, 2 P.

—Ed.]

Wms. 176.

(F) By recent cases this is explained to mean a sufficiency, after paying the debts, legacies, and every other demand on the personal fund. See antea, 343, of this edit. in the text and notes, and postea, 956, the first section of the note there. That the personal estate is the proper and primary fund for the payment of debts and legacies, numerous cases may be adduced. Amongst the late decisions, *Tuit v. Northick*, 4 Ves. 816; *Tower v. Row*, 18 ib. 133; and *Aldrick v. Wallscourt*, 1 Ball. & Bea. 312, are the principal.

(G) For the personal estate having received the benefit of the speciality debt or loan, it seemed reasonable that that fund should be primarily liable to exonerate the real estate.

his security against the one or the other at his election; yet, if the heir be charged in debt, where the executor has assets, the former may ultimately compel the latter in equity to pay the debt, unless he can shew some special exemption by the act of his testator, upon which he ought to be discharged.

*Personal estate
primary fund
for payment of
mortgage be-
tween heir and
executor.*

[814]
*And whether
heir be hæres
natus, or hæres
factus, it will
be the same.*

It being then once established, that a mortgage was a specialty debt (s) (n), it followed of course that the personal estate was in the first place to answer it in equity, as between the heir at law of the mortgagor and his personal representatives.

But although the principle upon which the heir at law, or *hæres natus*, might compel an executor, in equity, to reimburse him what he had laid out in discharge of a mortgage, or to disencumber the mortgagor in his favour, obviously applied with equal force in favour of an *hæres factus*, or one substituted in lieu of the heir at law where such substitution was lawful; that principle not being founded upon the privilege of the heir at law, but upon the nature of the contract, and therefore equally applicable, whether the land passed to one claiming as heir at law, or as heir by constitution of the owner, yet, in the case of *Cornish v. Mew* (t), which occurred so late as 1677, the Court of Chancery distinguished the case of an heir at law from that of an heir constituted in trust, and refused in the latter case to exonerate the real estate in favour of the trustee (1); and in the case of *Pockley v. Pockley* (u), which

(s) *Cope v. Cope*, 2 Salk. 449. S. C. Eq. Ca. Abr. 269. 1 Ch. Ca. 74, 271. 2 Ch. Ca. 5. Ca. temp. Talb. 54. 3 Bro. P. C. 520. 14. Hard. 512. *King v. King*, 3 P. Wms. 358. 1 Vern. 436. Pre. Ch. 455. 3 Ch. Rep. 256. S. L. as to a pledge, the foundation of that contract also being debt, 2 Freem. 272, [and *Phillips v. An-*

nesley, 2 Atk. 58, where the personal estate is called the natural and proper fund for the payment of debts, —Ed.]

(t) 1 Ch. Ca. 271.

(u) 1 Vern. 36. Ch. Ca. 84. Et vide *Lady Middleton v. Middleton*, 2 Freem. 189. *Howes v. Warner*, ib. 277. *Bishop v. Sharp*, 2 ib. 276.

(H) *Sed quære* if a mortgage can, strictly speaking, be said to be a specialty debt. It will not as such subject the real assets of the mortgagor to its payment, which as a specialty debt it ought to do. See postea, 927, in the text; and Lord Eldon's observations in *Aldrich v. Cooper*, cited in note there.

*Reference to
old cases on dis-
tinction be-
tween hæres
factus and
hæres natus.*

(I) This diversity is to be found in the old cases, viz. that a devisee of particular lands was not allowed to have the benefit of the personal estate, while an *hæres factus* of the whole property was permitted to enjoy that advantage. Per Rawlinson, Comm. *Gower v. Mead*, Pr. Ch. 3. Et vide *Howell v. Price*, 1 P. Wms. 291. S. C. Pr. Ch. 477. *Portsmouth v. Suffolk*, 1 Ves. 31. *Robinson v. Gee*, ib. 251. 2 Bro. C. C. 263. 2 Atk. 436. In *Lutkins v. Leigh*, Ca. Temp. Talb. 54. The case of an *hæres factus* was treated as not quite so favourable as that of an heir at law. Lord Talbot's language was this,—"But here the real estate is devised away, which gives the legatees rather a stronger claim than when they have to do with an heir at law; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases which distin-

was agitated in 1681, it is said to have been *then* only lately decided, that an *heres factus*, or heir by substitution of the whole estate, should be allowed the benefit of having the real estate discharged. But in that case, Lord Finch, Chancellor, said, that not only he who was *heres factus* should pray in aid of the personal estate to discharge the real estate, but even an *ordinary devisee* should have that benefit (x).

[815]

Accordingly, in the case of an ordinary devise (x), where the defendant's testator having made a mortgage of his lands for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage-money, and afterwards devised the lands so in mortgage, *as to one moiety* thereof, to the plaintiff, &c. and made the defendant executor, and devised the personal estate to his executor *for the payment of his debts*: The single question was, whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls, that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners.

General devisee entitled to have personal fund applied in payment of mortgage on devised estate (L).

(x) *Johnson v. Millsop*, 2 Vern. 112.

guish in that case between a devisee and an heir at law; though at last he has prevailed where there is no damage done to a third person: but it has been endeavoured here to put him in a better condition than the heir, and to that end, has been cited 1 Salk. 416. There is a great difference between that case and this; for a bond affects not the real estate in the testator's hands; nor did it the devisee, until the statute of fraudulent devises; nor before the statute 3 & 4 W. & M. c. 14. did it affect the heir, if he had aliened before the writ brought; but in case of a mortgage, *that* is a lien upon the land, both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus the court has gone as far as is reasonable, viz. to put the *heres factus* in as good a plight as the *heres natus*; but not in a better."

(K) And this has been followed ever since; per Lord Hardwicke, in *Galton v. Hancock*, 2 Atk. 436. The words "ordinary devisee" are, it is conceived, to be understood as placed in opposition to "*heres factus*," or a general devisee of all the testator's lands. The former words may therefore be considered as embracing a devisee of particular lands; and that the rule will hold in favour of such a devisee, see *postea*, 827. 954, and *Fox v. Fox*, 1 Atk. 463. And it is observable, that the rule throwing the burden on the personal fund, in favour of the heir at law, general or particular devisee, applies whether there is a bond or covenant for payment of the mortgage money or not. *Tinkerville v. Fawcett*, 1 Cox, 239. *Cope v. Cope*, 2 Salk. 449. *King v. King*, 3 P. Wms. 358. and *Meynel v. Howard*, Pr. Ch. 61.

Rule applies to heir, particular and general devisee, whether there be covenant or not.

(L) This rule was recognised in *White v. White*, 2 Vern. 43. S. C. *postea*, 821. *Mead v. Hide*, 2 Vern. 120. Pr. Ch. 2, *postea*, 828. *Gainsborough's case*, 2 Freem. 188, 1st resol. S. C. *postea*, 954. *Lovel v. Lancaster*, 2 Vern. 163, *postea*, 831. *Fox v. Fox*, 1 Atk. 463, *postea*, 1146. *Bartholomew v. May*, 1 Atk. 487, *Reeves v. Horne*, 4 Vin. Abr. 457, pl. 12, and by the cases mentioned in p. 814, *antea*, n. (u). But a devisee of a particular estate, as distinguished from a devisee of the whole real property of the testator, will not be entitled to this benefit, see *postea*, 881.

Cases recognising rule in text.

[816]
Same law ap-
plies to customs
of York.

And since the true ground upon which this equity is founded has been ascertained, and the nature of a mortgage clearly understood, this principle has been admitted in its fullest extent as to mortgages. Thus, in the case of *Pockley v. Pockley* (y), it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of York; for the custom cannot take place until after the debts paid.

And London.

So a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part by the custom of London (z).

And to Welch
mortgages.

And although the security be in the nature of a Welch mortgage, in which no certain time is mentioned for redemption, yet the rule has been determined to be the same as to the application of assets; for still the basis of the contract is the debt, [notwithstanding there is neither bond or covenant for payment of money], and the land is taken *collaterally* as a pledge (a).

[817]
But it does not
interfere with
legatee, widow's
right to para-
phernalia, or
creditors.

But the equity of the Court of Chancery affords to a person entitled to a real estate by descent or devise, to have the incumbrances upon it discharged as a debt out of the personal estate, goes no further than as between the heir or devisee of the estate and the residuary legatee; it does not interfere with the disposition of other parts, as specific or general legacies, *a fortiori* not with a widow's right to paraphernalia, and much less with the interest of creditors (b) (M).

(y) 1 Vern. 36. Et vide *S. C.* nom.

Popley v. Popley, Ch. Ca. 84.

(z) *Ball v. Ball*, cited 2 P. Wms.

335, n.

(a) *Howell v. Price*, Pre. Ch. 477.

[*S. C.* 1 P. Wms. 291. 1 Ves. jun.

406.—Ed.]

(b) 2 Ves. jun. 64, 65.

Rule of exoneration between heir and executor works no prejudice to legatee or widow's right to paraphernalia.

(M) That the rule for exonerating the real out of the personal estate, does not apply to the disappointment of specific or pecuniary legatees (though it does to the total exclusion of the residuary legatee), see *O'Neal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 729. *Davis v. Gardiner*, 2 ib. 190. *Rider v. Wager*, ib. 335. *Chaplin v. Chaplin*, 3 ib. 367. and *Bartholomew v. May*, 1 Atk. 487. And that the wife's right to her paraphernalia will remain undisturbed by the application of the rule, *Tipping v. Tipping*, ubi supra; *Puckering v. Puckering*, cited 1 P. Wms. 730; and *Tynt v. Tynt*, 2 P. Wms. 542, in which latter reference, it is said, "as to the bona paraphernalia of the widow, though there be debts more than the personal estate will extend to pay, yet as these are liable only in favour of creditors, and not of the heir, nor of the devisee, who stands in the place of the heir, and is *hæres factus*: if the lands devised be sufficient to pay the recognizance, the bona paraphernalia shall be enjoyed by the widow; but if those devised lands should prove insufficient, the bona paraphernalia must be subject before the sureties lands shall be extended." Mr. Cox adds, "as against real assets descended, it seems that upon the authority of *Tipping v. Tipping*, the wife shall stand in the place of creditors for the amount of her paraphernalia. See *Snelson v. Corbet*, 3 Atk. 369. *Graham v. London-derry*, ibid. 393. *Sed quare*, as against real assets devised," citing *Probert*

Although the general rule of equity is to apply the personal estate, in the first place, for the payment of all debts, as well specialty debts, which attach upon the land, as simple contract debts, and it is equally certain that a testator cannot, as against his creditors, exempt the personal estate; yet, as against the heir at law, or the devisee of his real estate, he may at pleasure substitute the real in the room of the personal estate, and charge all his debts upon that fund, though not primarily liable. In equity this may be done, either by an instrument indicating such intention in express terms (*bb*), or by an instrument implying a *plain and manifest intention* of the testator to exempt his personal estate, or to give the personal estate as a specific legacy; for he may do this as well as give the bulk of his real estate in that shape.

Mortgagor may against heir or devisee, but not against creditors, exempt personal fund from debts and legacies by throwing them on real estate (N).

[818]

As the consideration of this doctrine naturally arises out of the part of our subject now in discussion, and as, depending merely on questions of intention, it has branched out into a variety of distinctions founded on minute differences and subtle refinements, which have enabled ingenious logicians to discover shades of distinction almost imperceptible to less scrutinizing observers, I shall here call the attention of the reader to this important, and, I may say, curious branch of learning, and endeavour to give a general idea of the criticisms to which it has given rise. In the pursuit of this object, I shall point out what circumstances have been held, not to furnish an inference, that the owner of both funds meant that the personal estate should not exonerate the real estate, and then I shall shew in what cases the personal estate has been exempted (o).

Points for consideration.

(*bb*) [Which is by far the preferable mode.—*Ed.*]

v. Clifford, Easter 1736. *S. C. Amb.* 6. And this *quære*, it seems, still remains unsettled. See *Toller's Ex.* 423, 4th edit. But in the case of a real estate charged with payment of debts in aid of the personal estate, the court has decreed that the wife shall retain her paraphernalia in prejudice of the charged estate. *Boyntun v. Boyntun*, 1 Cox. Rep. 106. *S. C.* 1 Bro. C. C. 576. For the rule in equity as to marshalling assets, see the end of this chapter, 1st section of note there.

(N) That the mortgagor cannot exempt his personal estate from payment of debts as against a mortgagee or creditors, see *Bowman v. Reece*, postea, 803. *Hazlewood v. Pope*, 3 P. Wms. 325. *Inchiquin v. French*, Amb. 37. *Stapleton v. Colville*, Ca. Temp. Talb. 208. And that the land cannot be exonerated out of the personal estate so as to disappoint any of the legacies, whether pecuniary or specific, see *Rider v. Wager*, 2 P. Wms. 335. *Cope v. Cope*, 2 Salk. 449. *O'Neal v. Mead*, 1 P. Wms. 693, postea, 861. *Tipping v. Tipping*, 1 P. Wms. 730. *Davis v. Gardiner*, 2 ib. 190. *Bartholomew v. May*, 1 Atk. 487, postea, 827. and *Hamilton v. Worley*, 2 Ves. jun. 65.

Reference to cases proving point in text.

(O) The consideration of these points exhausts a principal portion of the present chapter. The discussion of the first point occupies from this to p. 841. The investigation of the second point then commences, and being divided into two heads, the first, as to an express exemption, p. 842, which

Division of chapter.

Devise for payment of debts and appointment of executor, evidence of intention to exempt personal fund from its usual burden.

[819]

In the case of *Feltham v. Harlston (c)*, it is stated to have been said by Serjeant Fountain, and admitted by the Master of the Rolls, that if a man devise lands for payment of his debts, and make an executor, and leave a personal estate; no part of the personal estate shall go to the payment of debts; because, by making an executor, the testator's intent appears that the executor should have the goods, the testator having made another provision for the payment of his debts; but if a man disposes of lands for the payment of his debts, and after dies intestate, the personal estate shall be chargeable in the hands of the administrator, for no such intent as before appears.

This, long since over-ruled.

But the distinction above alluded to, has been long since over-ruled; and it has been held, that where the personal estate falls upon the executor *virtute officii*, there the executor shall apply the personal estate in exoneration of the real.

Personal estate first applicable to debts and legacies, notwithstanding trust for their payment.

[820]

This was the case of *Lord and Lady Grey (d)*, where the father made a conveyance of an estate to trustees and their heirs, to pay his debts and legacies, and subject thereto for performance of his will; and, at the same time, made his will, and thereby devised that the trustees should pay 2000*l.* a-piece to his sons R. and L., and also 6000*l.* to his daughter, the surplus to his heir, and made his wife executrix, but gave her not thereby *in terms* the personal estate; and it was decreed that the personal estate should be accounted for in aid of the heir, as well with regard to what he should be charged for the creditors, as for the legacies.

Personal fund must pay mortgage on real estate, though it leave younger children destitute.

And it was decreed in *Sir Peter Soame's case (e)*, where a father died intestate, leaving a mortgage on his real estate made by himself, that the personal estate should be applied to pay

(c) 1 Lev. 203.

(d) *Lord Gray v. Lady Gray*, 1 Ch. Ca. 296. *S. L. Mead v. Hide*, *infra*,

828. 880. Et vide *Gray v. Minithorpe*, 3 Ves. 106. 109, *infra*, 838.

(e) 1 P. Wms. 694, cited.

is again sub-divided into an express exemption by positive words, p. 842; and words implying a negative, p. 845: and the second, as to an implied exemption of the personal estate, p. 846, (and herein of specific legacies, 862) terminates at p. 903. The learned author then proceeds to state (what indeed is more directly applicable to the subject of his treatise than the previous divisions) the principal cases wherein a descended estate has been held to exonerate a devised estate mortgaged, from p. 903 to 920; 2dly. the instances where the personal estate of a purchaser or heir at law buying or taking an estate subject to a mortgage, shall be exempt from exonerating the land of the mortgage debt, from p. 920 to 937; and, 3dly. the authorities respecting the purchaser's or heir's intention to make the mortgage debt his own, by any and what acts of acknowledgment, from p. 937 to 951. The chapter then concludes with a few remarks on the question, whether parol evidence be admissible to shew which fund the testator really meant to charge with the burden of his debts and legacies?

off the mortgage, although the younger children were thereby left destitute (P).

And the rule of equity is equally applicable, where there is a gift of the personal estate to the executor, if nothing be done to shew that he is meant to take as a *legatee*, and not as executor merely. Thus, where one (f) devised his personal estate to his wife, *whom he made executrix*, Lord Somers decreed, that she took it as executrix, and that the personal estate was to be applied in the exoneration of the real estate (Q).

[821]

*So if bequest
be by way of
residue.*

So, although the bequest to the executor were by way of residue, the personal fund would nevertheless be liable to exonerate the real estate; and, therefore, should one bequeath several specific legacies out of his personal estate (g), and afterwards, in the conclusion of his will, give and devise all the rest and residue of his personal estate to his wife or a stranger, whom he thereby made an *executrix* or *executor*, the personal estate would be first applied towards the payment of specialty debts for the benefit of the heir.

Thus, where a man devised several legacies, subject to particular charges thereon, and gave the surplus of his personal estate to his wife, the personal estate was directed to be applied in case of the real (h).

And, on this principle (i), where one devised the surplus of his estate, his debts and legacies being paid, to his wife and

*Provided exe-
cutor takes qua
such, and not
as legatee.*

(f) *Cutler v. Coxeter*, 2 Vern. 302.
1693.

500, pl. 30.—Ed.]

(h) *White v. White*, 1 Vern. 43.

(g) *Anon.* 2 Vent. 340. *Noke v. Derby*, 3 Bro. P. C. 290. [S. C. 11 Vin. Abr. 243. 2 Eq. Ca. Abr.

(i) *Et vide Barton v. Stone*, 2 Vern. 308. 1693.

(P) In like manner, if the personal estate be given to the next of kin, and be not expressly exempted from the payment of debts, it must be applied in discharge of the testator's mortgages, although it will thereby exhaust the whole fund. Thus in *Phillips v. Phillips*, 2 Bro. C. C. 273, the testator having mortgaged his estates, devised the same to the plaintiff for life, with remainders over, and then "gave and bequeathed all the rest and residue of his personal estate to his executors (the defendants) to divide the same amongst his next of kin, share and share alike." The next of kin insisting, that this was a specific bequest to them of the residue, and therefore not liable to the mortgage debts, the executors refused to discharge the mortgages without the opinion of the court. The Master of the Rolls said, the rule of the court was settled beyond doubt; he could not look for the construction to the state of the residuary which was a fluctuating fund; and decreed an account of the personal estate, which he directed should be applied in a course of administration, and the tenant for life to stand in the place of such creditors, to whom interest had been paid by him.

*Personal estate
given to next
of kin must
discharge mort-
gages, though
it be thereby
exhausted.*

(Q) "For that his Lordship was well satisfied by the words of the will, that the said testator did not intend to exempt his personal estate from the payment of his debts. Reg. Lib. 1693. A. fol. 54, entered *Cutler v. Greening*." Raithby's n. (1).

[822]

his eldest son John, equally to be divided between them, and added, *whom he made his executors*; and farther willed that she should continue his true widow, but if she married again, his will was, she should render the right of being executrix to his son Roger, to be partner with his brother John in the executorship; the widow of the testator married, and the question was, whether by the marriage she had forfeited her share of the surplus? It was held by Lord Somers, upon the authority of the last-mentioned case, that she had; *for she took as executrix, and not as legatee.*

Residuary legatee being constituted executor in same sentence, implies that he is to take as executor.

I should here observe, that the circumstance of the bequest, and the constitution of executor, being in the same sentence, and in favour of the same person, has been sometimes considered as an important feature in these kind of cases; and the cases of *Cutler v. Coreter*, and of *Barton v. Stone*, have been occasionally resolved upon that principle; and it appears to me, that this circumstance is material as furnishing an index to the then state of mind of the testator; it implies the fact, that the testator contemplates his legatee as his executor, his executor as his legatee, and that, therefore, as he speaks of them in the same breath in both characters, he shall be taken as viewing both characters indifferently, and as one. But the opposite inference was discussed before Lord Harcourt, in a case which arose upon the will of Lord Chief Justice Hale (*k*), and disallowed; the circumstances of that case, so far as are material at present, were as follows: Lord Chief Justice Hale, after giving away his study of books to such of his grandchildren as should study the law, and his mathematical instruments to his wife, devised the rest and residue of his personal estate to his wife, and then went on and gave several other directions, touching other things, and, in the close of his will, said, *I do hereby make and ordain my said wife sole executrix of this my last will and testament.* And one question was, whether the express devise to the wife, of all the rest and residue of his personal estate in one part of the will, should be so coupled with the last clause, whereby he made her executrix, as to be all one with the case, where a man devised all the rest and residue of his personal estate to his wife or any other, whom he thereby made executrix; or whether this devise of the rest and residue of his personal estate, being a distinct and independent clause, should be looked upon as a specific legacy

[823]

(*k*) *Hale v. Brooker*, Gilb. Rep. Eq. 73, [mentioned *infra*, 875.—Ed.]

to her, and to exempt such residue from being applied in the first place towards payment of the debts, in ease and exoneration of the real estate expressly devised for that purpose, as it would have been if another person had been made executor? Mr. Vernon insisted that it should be exempted; that here he gave her the residue of the estate as a legacy, before he seemed to consider who should be his executors; that the making the executrix was in a distinct clause after, and had no relation to the devise in the will to her before; but Lord Keeper Harcourt, inclined that it would be all one. And this seems reasonable, if the principle on which the cases last alluded to stand, be, that since the devise to the executor is perfectly superfluous and idle, and no more than the law would say, were there no such express devise, the executor must take such residue in the same manner as he would have done had it been left generally to fall upon him as executor; and, therefore, such executor must take the personal estate after payment of debts and legacies thereout, as the proper and obvious fund for that purpose, and to the payment whereof his office of executor obliges him (R).

There are several ways, by any of which a man may subject his real estate, to the payment of both specialty and simple contract debts; as, by conveying his estate to trustees for a term of years or in fee, in order to pay the debts; or by way of charge in equity, which the Court of Chancery will decree to be performed; or he may direct that his real estate may be sold for payment of his debts; but which ever of these modes he adopts, none of them will make the real estate first chargeable; if there be not in the will, either express words, or a manifest intent to discharge the personal estate, it will, nevertheless, be first liable (I): for the same principle on which a Court of Equity raises an equity in favour of the *hæres natua*, or of the *devisee*, against the personal representative in respect of debts, which, in their original nature, attach upon the real fund, equally pervades the case, notwithstanding such provision be made as to them; for the rule springs out of that great source from whence most of our principles relating to real property are derived, the feudal system, and has for its object, the

[824]

But Lord Harcourt (with good reason) thought it all one, though bequest and appointment were in distinct sentences.

Modes whereby real estate may be subjected to specialty and simple-contract debts; but unless intention to exempt personal estate be very apparent that fund will in every case be first liable (s).

[825]

(I) Vide *Burton v. Knowlton*, 3 Ves. 107. *Brumel v. Prothero*, ib. 111, [infra, 890-899.—Ed.]

(R) This subject is resumed, postea, p. 831, *et seq.* to 833.

(S) The general rule is now perfectly established, that in order to exonerate the personal estate, there must be either express words or a plain intention. Per Sir W. Grant, 11 Ves. 186.

[826]

protection of the freeholder ; and there is the same reason for raising an equity in his favour, where his estate is rendered liable to the debt by the act of the owner, as where it is rendered liable to the debt by the act of law : but another principle interferes, as to simple contract debts so charged, for such will, to that extent, is a disinheritance of the heir, which, upon the old maxim of law, cannot be effected but by express words or necessary implication. Besides, in both instances, equity acts in conformity with the general construction it puts upon such provisions ; because every provision of this kind takes effect through the medium of a trust either expressed or implied. Now a trust does not affect the rights of parties interested in the thing bound by it, farther than the object in view requires. In whatever mode the estate is charged, subject to the charge it belongs to the heir. It is his land. He may pay the debts, and call for a conveyance. The same observation applies to the *hæres factus* or devisee. Whether the estate come to the devisee charged with the debts, or be devised to a trustee for a term to secure the debts, or be absolutely given for that purpose, it is notwithstanding the estate of the heir or devisee, though subject to the charge. The same policy therefore which raises an equity, where there are specialty debts in favour of the heir, dictates the same equity where simple contract debts are, by the testator, placed on the same footing as specialty debts.

[827]

Charge of debts
in equity on
particular lands
no exoneration
of personal
fund.

Therefore, notwithstanding the real estate be bound by way of charge in equity, which the Court of Chancery will decree to be performed, yet it shall be exonerated by the personal estate.

Thus, where one by her will said, " I devise to A. B., my heir, Clifton lands (m), he paying all debts and legacies charged on these lands, and after his decease (n), to my nephew B," and in another part of her will, said, " I leave my jewels, plate, pictures, medals, and furniture, to my two executors, to be equally divided," and in the last clause of her will, said, " Creating St. Mary's, and Creating St. Olive's, I make liable to all debts, notes or bonds, I have contracted since 1735, if any, and what remains to be paid to D., after the Creatings are sold." Lord Hardwicke held, that the making a particular estate in the land liable to pay debts, did not exonerate the personal estate ; because it was the material fund for the pay-

(m) *Bridgman v. Dove*, 3 Atk. 201,
[et vide postea, 878 and 912.—Ed.]

(n) Et vide *Bartholomew v. May*,
1 Atk. 487.

ment of debts: and his Lordship was of opinion, that the residue of the personal estate ought in this case, to be applied in exoneration of the real.

So where D. by will devised several legacies (o), and *inter alia*, 20*l.* to H., and made his executor, and devised his real estate to M., paying his debts and legacies; and devised, that if he did not pay the legacies in three months, and the debts in two months, the legatees and creditors might enter and hold till satisfied (T). It was decreed, on a question, whether the personal estate should be applied in case of the real estate, that it should; for that the devise amounted but to a charge upon the real estate, and intended not to avoid the estate in case of non-payment.

Again, if lands be devised for the payment of debts and legacies (p), and the residue of the personal estate be given to executors after the debts and legacies paid; the personal estate shall notwithstanding, as far as it will go, be applied to the payment of the debts, &c. and the land charged no further than is necessary to make up the residue.

So, where a man devises his estate to his trustees to be sold for payment of his debts, the personal estate shall nevertheless exonerate it as against a residuary legatee; for the residue implies, *after debts and legacies paid*.

Thus, where a man devised all his freehold houses, lands, and hereditaments (q), in W., to three trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them for payment of his just debts; and, after disposing of some particular legacies, gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate, not before disposed of; the question was, whether the personal estate should be first ap-

[828]

Devise to M. he paying debts and legacies, personal estate must be first applied.

And land charged with deficiency only.

No residue till debts and legacies paid.

[829]

Devise to trustees to sell and pay debts, residue to A. Personal estate first applicable, there being no words to exempt it (v).

(o) *Mead v. Hide*, 2 Vern. 120.

[S. C. postea, 880. nom. *Gower v. Mead*.—Ed.]

(p) *Anon.* 2 Ventr. 349.

(q) *Fereges v. Robinson*, Bunb. 301.

Lovel v. Lancaster, 2 Vern. 183. [S. C. postea, 831.—Ed.]

(T) The words of the devise were, that the said testator "did give and bequeath unto the said Elizabeth Mead (the plaintiff) all his lands, tenements, messuages, houses, and bullaries of salt water, whatsoever and wheresoever, to hold to her, her heirs and assigns for ever, upon condition she paid all his debts owing, and legacies bequeathed in his will." Reg. Lib. 1689. B. fol. 308.

(U) In like manner in *Hancox v. Abbey*, 11 Ves. 186, the Master of the Rolls declared that a devise to sell for payment of all debts should not exonerate the personal estate; for that shewed nothing more to be intended than that all the debts should be paid, and that the real estate, if it were necessary, should be applied as an additional or auxiliary fund.

Words of devise.

Reason for not exempting personally, where there is a devise for debts.

plied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose? It was insisted, on behalf of the *residuary legatee* (r), that the real estate being not only made subject, but directed to be sold for the payment of the debts, the personal estate should not be applied for that purpose. But it was held *per totam curiam*, that here being no negative words to exclude the personal estate from being applied for the payment of debts, it ought to be first applied for the benefit of the heir at law. And it was decreed accordingly.

[830]

Personal estate must pay debts and legacies, though term of real estate be by deed created expressly for their payment (x).

And the rule of law is the same, if a term be created expressly for payment of debts. The personal estate shall be applied in case of the real.

Thus, where one, after several particular legacies, devised all his goods and chattels to A. B. and C., *to their own disposition*, and made them executors (s); and by indenture of the same date, demised several manors and lands to A. and C., for 500 years, in trust for himself for life, and after his death upon trust, out of the rents and profits to pay his debts, legacies, and funeral expences, and four years afterwards to attend the inheritance; on a bill exhibited by the heir at law of the testator, to have an account of the personal estate, and of the rents and profits of the real estate, and that the personal estate might be applied to pay debts and legacies, in case of the real, it was insisted by the executors, that they were entitled to the personal estate as a legacy; but it was decreed that the personal estate should be applied in exoneration of the real.

[831]

Devise of one estate for payment of debts of another, to B. subject to a mortgage, and bequest of personalty also to B. he takes estate cum onere and must pay debts.

So, if the provision be made in the shape of an express trust of the inheritance, the rule will still be the same.

Thus, in the case of *Lovel v. Lancaster* (t), where T. S. devised land to A. B., for payment of debts, and devised to T. D. certain lands, which the testator in his life-time had mortgaged, and likewise gave him his personal estate; the question was,

(r) *Quære*, whether the legatee was executor? [This *quære* is made in reference to the cases cited postea, 932.—Ed.]

(s) *Cook v. Gwavas*, 9 Mod. 187. [Gray v. Gray, antea, 819, and

French v. Chichester, postea, 833, are also instances of trusts of the inheritance created during life.—Ed.]

(t) 2 Vern. 183. Vide [S. C. Semb.] Pre. Ch. 3. 2 P. Wms. 335. 190.

(X) See *Powis v. Corbett*, postea, 912, and distinguish this case from that. See also *Read v. Lichfield*, postea, 878, in *notis*, for a contrast between the above case and a devise for payment of debts by means of a term, where there is an evident intention to throw the burthen entirely on the real estate.

whether T. D. should have the benefit of the trust for payment of debts, so as to have the money owing on the mortgage paid off by money raised out of the trust, that the land might come to him clear of the debt owing to the mortgagee? And it was held, that he must take the mortgaged land, *cum onere*; and that the personal estate also, though devised to him, must nevertheless be subject to the debts, notwithstanding lands were devised for the payment of them (Y).

The circumstance of the personal estate being given to a person, and that person being named executor in the same sentence in which such bequest is made, has been considered, as well in cases where a provision is made for payment of debts by charge, &c. on the real estate, as in cases where specialty debts are indifferently chargeable on both funds, as furnishing evidence, that such person is intended to take the personal estate in his official character, and not as legatee; for it has before been observed (Z), it is to be presumed, that the testator, speaking of the whole in the same breath, has but one design, *viz.* to give the personal estate to him as executor, who, in the same moment that he gives him his estate, he constitutes executor.

The case of *Broomhall v. Wilbraham* (u), furnishes an instance of this kind. There a testator devised in the following words, *viz.* all my personal estate, of what nature, kind, or quality soever, I give to my sister A., whom I make my executrix; and all my real estate, of what kind, nature, or quality soever, I give unto my sons B. and C., *chargeable with my debts*. And it was held at the Rolls, that the personal estate

Resumption of subject discontinued in page 824.

[832]

Gift of personal estate to A. (who is appointed executrix) and of real estate to B. charged with debts, personal estate first liable.

(u) Cited Ca. temp. Talb. 204.

(Y) Mr. Raithby's note to this case, supported by per Reg. Lib. is material. It is in these words:—"There does not appear to be any direct devise of lands for payment of debts. The testator in his life-time conveyed to certain persons by indentures of lease and release the premises therein mentioned, upon trust that they should sell and dispose thereof for and towards payment of his debts to such person or persons, and in such manner as he, his executors, or administrators, should direct or appoint; but no appointment by the will appears so far as the same is stated in the Register's Book: the decree directs, that in case the personal estate should not be sufficient for payment of the debts, then the trust estate to come in aid and be applied to pay what the personal estate shall fall short to pay." Reg. Lib. 1690. B. fol. 166. Considering then the mortgage as a debt, it should seem to follow, that if the personal estate were insufficient to discharge all the debts, reckoning the mortgage as one, T. D. might well call on the conveyed estates for payment of the deficiency; and consequently he would take the estate devised to him *cum onere*, only in case the personal estate were insufficient to discharge all the debts and the mortgage likewise.

Case in text explained and qualified.

(Z) See *antea*, p. 786, of this edition.

should be first liable, and that decree was afterwards affirmed (A).

Appointment of executor, being a continuation of clause giving him personal estate, evidence that he was intended to take as executor, if no words added that bequest was to be free from debts.

[835]

And this circumstance, of the bequest of the personal estate being in the same clause, in which the legatee was named executrix was considered, in the case of *French v. Chichester*, as it is reported in Vernon (x), as demonstrative, that the legatee was meant to take as executrix; and *that*, although the legacy was in favour of a wife, and the testator *expressly declared* in his will, that the same was given her *as a compensation for her own inheritance*, with which her husband had prevailed upon her to part (B).

This case came on upon a bill of review. The error assigned and relied on was, that *John Chichester* (y), as heir and executor to his father, having raised sufficient out of the real and personal estate for payment of his sister's portions, devised to them by his father's will, and having paid all but one sister, who was under age, did by deed convey several lands to trustees for payment of his debts; and afterwards made his will, and thereby also directed that his trustees should, out of his trust estate, pay his debts, legacies, and funeral, and thereby devised to his wife, "*whom he made his executrix* (z)," all his

(x) 2 Vern. 568.

(y) *French v. Chichester*, 2 Vern. 568. Vide the authority of this case, questioned by Lord Talbot, Ca. temp. Talb. 209. et infra, [835, but it was affirmed in Dom. Prec. 1 Bro.

P. C. 192.—Ed.]

(z) *Note*. This I take to have been the language of the will. Vide *Cutler v. Careter*, and *Barton v. Stone*, supra, 820, 1.

Devise to pay debts no exemption of personality given to wife executrix. Sed quære if personality had been given to her own use.

(A) So in *Lucy v. Bromley*, Fitzg. 41, where J. S. by will settled his land for payment of his debts, and made M. his wife executrix, and devised all his personal estate to her, and, by subsequent clauses, gave several specific and pecuniary legacies to her and died. It was adjudged that M. took the personal estate, not as legatee but as executrix, and so the same after the legacies paid, was held applicable to discharge the real estate in favour of the heir. Bunbury's report of this case is as follows:—A. by will charged his real estate with payment of his debts, funeral, and legacies, and gave to M. his wife 1000*l.*, payable in two years after his death, with interest, and his house in R. with the use of the goods therein for life, and the use of his plate and goods at C. during her widowhood; and, after other legacies, testator concluded his will, and made his wife sole executrix of his will, and of all his goods, chattels, and arrears of rent, not before given or limited in his will. *Per curiam*, the personal estate in the hands of M. ought to be applied to pay his debts, in case of the real estate. Note [by the reporter], it was insisted, that making M. executrix of particulars amounted to no more than making her executrix in general. But *per* Penngelly, C. B. if the words *to her own use* had been added, or such like words, it might have given some cause of doubt.

(B) But Lord Harcourt inclined to think that it would be immaterial whether the bequest of the personality and the appointment of executors were in the same or distinct clauses, and the learned author appears to acquiesce in that opinion, see *antea*, 787, of this edition.

personal estate not otherwise disposed of (c), intending thereby a provision for her, *she having been prevailed upon to sell away part of her own inheritance*. And the question was, between the heir and executor, whether the wife and executrix should have the personal estate as devised to her, and leave the debts charged upon the land; or whether the personal estate should be applied in ease and exoneration of the real estate? On the part of the wife, it was insisted, that the testator having charged his debts upon his land, and afterwards by his will having charged even his legacies and funeral expences upon his land, and devised his personal estate to his wife, did sufficiently manifest his intention, that his wife should have his personal estate as a provision for her, and to her own use; and that the same was but a small recompence for what she had parted with; but if made liable to debts, *the whole would be exhausted*, and the provision intended for the wife defeated; and that the known rule was, that where the personal estate was devised away, the heir should not have it applied in exoneration of the real. But the Lord Keeper Wright upon the former hearing, and the then Lord Keeper Cowper on the bill of review, were both of opinion, that the devise being in the same clause in which *she was named executrix (a)*, and not said free and exempt from payment of debts, she must therefore take it as executrix, and the same must be applied for payment of debts; and the demurrer was allowed, and the bill of review dismissed.

[834]

[835]

But Lord Talbot, in the case of *Stapleton v. Colville (b)*, although he admitted that the circumstance of the personal estate being bequeathed, and the legatee being named executor in the same clause, had been considered of great weight in such cases, and had in some instances been decisive, as furnishing an inference, that the executor was to take as executor and not as legatee, and consequently subject to the exoneration of the real estate; yet doubted the authority of *French v. Chichester*, if that circumstance was the only one on which it was grounded: for his Lordship thought that there was a plain difference, as between the case of making a man executor, and

Lord Talbot's reasons for doubting authority of preceding case.

(a) Note, in *Barnfield v. Wyndham*, infra, 851, the wife was made executrix in the same clause that bequeathed to her all this personal estate, yet it was held, that she took the personal estate exempt from the

burthen of the debts. See these cases distinguished in p. 852, infra. [This, it is conceived, is the meaning of the author's short note here, in the 4th edit. of his treatise—Ed.]

(b) Vide infra, 875.

[836] the making him likewise a legatee of the personal estate; because, if the executor died in the first instance intestate, before probate, the representative of the testator was entitled to the administration; whereas, in the latter instance, there being an express gift to him, he took as legatee; and consequently upon his death his representative would be entitled to it, an interest being vested in him in his own right, in the one case, but nothing at all in the other, until he had converted it.

His suggestion of better ground for Broomhall v. Wilbraham than that in p. 832.

And Lord Talbot, in the before-mentioned case of *Stapleton v. Colville*, observed further, that, in the case of *Broomhall v. Wilbraham* (c), it appeared, that, had the real estate which was devised to the sons been charged with the debt, they would have had nothing, and the testator's sisters, who were the devisees of the personal estate, would have ran away with the whole; and that the question being between the testator's own children and his sisters, it was natural and just to construe the intent in favour of the children, and to lay the load on the personal estate.

[837]
Author's reasons for supporting cases invalidated by Lord Talbot.

However, I am inclined to think, that the decree in *Broomhall v. Wilbraham* might, upon the authority of the cases of *Cutler v. Coxeter* and *Barton v. Stone* (d), be supported upon the circumstance of the bequest being comprized in the same sentence in which the legatee was made executrix, without having recourse to the equitable ground taken by his Lordship; because there appears to me no reason to distinguish this case from those to which I have alluded, unless upon the ground, that in the case of *Broomhall v. Wilbraham* the debts were provided for by a charge on the real estate; but that seems to be no ground for exempting the personal estate, that circumstance alone being considered only as enlarging the fund, and not as affecting the equity, as between the heir and the executor. And it seems to me, that the case of *French v. Chichester* is distinguishable from the cases of *Cutler v. Coxeter*, *Barton v. Stone*, and *Broomhall v. Wilbraham*, on the ground that the personal estate being given as a provision for the wife, and in respect of her having been induced to part with her own inheritance, *rebutted any equity* that might have arisen in favour of the heir, had those circumstances been out of the case.

[838*]

(c) *Supra*, 832.

(d) *Supra*, 820, 1.

* For the residue of this page, beyond the next paragraph, see *postea*, p. 799, of this edition.

And though an estate be devised to be sold out and out for payment of debts and funeral expences, with a particular disposition of the surplus money; yet if the personal estate be not otherwise disposed of than by the appointment of an executor, the personal estate will be liable to exonerate the devised estate: and the devisees of the surplus will be entitled to call upon the executor in equity to reimburse them out of the personal estate, so much of the fund arising by sale of the real estate, as has been paid in discharge of debts and funeral expences, in exoneration of the personal estate (e) (D).

Estate to be sold out and out for payment of debts.—Personal estate not otherwise disposed of than by appointment of executor, first liable.

And the mere circumstance (k), that both funds are given to the same persons, furnishes great room for presuming, that the personal estate is not intended to be exempted from exonerating the real estate (E).

[846†]

(e) Vide *Gray v. Minithorpe*, 3 Ves. 2 Vern. 740. [S. C. Gilb. Eq. Rep. 103. [S. C. antea, 819.—Ed.] 128. 1 Dick. 26. 6 Bro. P. C. 291.

(k) *Dolman v. Smith*, Pre. Ch. 456, Toml. edit. on other points.—Ed.]

† The former part of this page may be found postea, p. 803, of this edition. The arrangement and subdivision of the text require this alteration. It is evident that the contents of pages 846, 847, 848, 849, 850, and 851, are entirely misplaced, if introduced (as in the 4th edition) under the second division of the subject, which commences at p. 803, postea, of this edition.

(D) Lord Loughborough's judgment was in these words:—"The court is bound to give effect to all the will. It is very clear the testator meant by the sale of the real estate to provide a fund for his debts. It is equally clear he supposed there might be a residue, of which he disposes, and then after answering all these payments, he supposes there will be still a residue, and gives that to another person. Then, as to the personal estate, there is no mention of it in the will except the mere nomination of an executor. No case comes up to this; that the mere nomination of an executor, though under circumstances that would give to him beneficially the personal estate, and not make it distributable to the next of kin, shall have the same effect as a distinct specific gift of it to an individual, as there was in *Bamfield v. Windham*, Pre. Ch. 101, and *Wainwright v. Bendless*, ib. 451. S. C. 2 Vern. 718. And it would be a strong conclusion when the effect would be to defeat those gifts the testator has clearly intended to make, if there should be a fund out of the produce of the sale of his real estate. They are not strictly legacies, but they are certainly in the nature of legacies; and the defendant's construction would in effect give to a person only nominated executor a right to all the personal estate, in opposition to the persons who are entitled to those sums by the will. Therefore I have no difficulty in holding, that the personal estate not particularly given to any one, but merely attached to the person of the executor, shall be liable in the first place. The costs must come out of the fund, and the residue, after paying the costs and the several sums of 50*l*. [which were directed by the testator to be paid out of the surplus,] must be paid over to the nephew J. Gray."

Lord Loughborough's judgment in Gray v. Minithorpe.

(E) When both funds are given to the same individual, it can be an object of little consequence which fund is to be first applied in payment of the debts, except perhaps in the instance alluded to by Lord Talbot, postea, p. 849; for what is disbursed with one hand must eventually be replaced by the other. See *Hale v. Cox*, 3 Bro. C. C. 322. 11 Ves. 187, and postea, 885. And it is submitted, that this deduction of the learned author is not substantiated by the case cited for its support, except indeed by Vernon's re-

Doctrine in text considered untenable.

Devise of real estate to trustee (charged with debts) till B. is twenty-five, then to B. in tail, with a small annuity to him in mean time. Bequest of personality to B., latter found not exonerated.

[847]

Thus, where A., by will, devised his household goods, and furniture to B., and 1000*l.* to C., payable at twenty-five, and likewise 500*l.* to D., payable at twenty-five, and devised all his manor, lands, tenements, and hereditaments, to trustees and their heirs in trust for the payment of his debts, legacies, and funeral, and then by his will expressly charged them with the payment thereof, and directed that his trustees should reserve the rents and profits of his estates till B. should attain his age of twenty-five years, and thereout allow him 25*l.* a-year; and 20*l.* a-piece to C. and D., until they should attain their ages of twenty-five years; and devised the residue of the rents and profits of the said estate, together with the same estate to B. in tail male, remainder to C. and D. in tail male successively, remainder in like manner to three other persons, with remainder to the right heirs of one of them, who was a stranger, and no relation to the family; and then devised several things to go along with the estate as heir-looms; and afterwards devised all the rest and residue of his goods, chattels, and personal estate before unbequeathed to B., and made the trustees his executors, and died. The question was, whether the personal estate belonged to B., exempt from debts, legacies, and funeral expences, or whether it should be applied in the first place towards satisfaction thereof, notwithstanding the express charge on the real estate for payment(F)? And Lord Cowper, on

port, which is very loose and unsatisfactory. The case turned entirely on another point; and not on the arbitrary and unreasonable ground suggested in the text. The decree was founded on an argument drawn from the frugal disposition of the testator, apparent throughout the whole will, whereby he restrained his heir at law (who was to take the personal estate) to a very trifling annuity out of his real property also devised to him, until he should have attained his age of twenty-five years, and then it was said the testator could never have meant to thus closely restrict his nearest relation as to one fund, and allow him the full latitude of the other. This argument was sufficient to support the decree, without resorting to the technical distinction in the text. The learned author further cites the case of *Hazlewood v. Pope*, postea, 848, where some reliance appears to have been placed on the circumstance of both funds being given to the same person. But Lord Talbot, in a subsequent case, has himself announced that his determination in *Hazlewood v. Pope* was not founded on this single circumstance, but upon the contemplation of the whole will taken together, see postea, 850. It is therefore conceived, that the proposition in the text is redundant and untenable; and this may be submitted without impugning the decision in *Dolman v. Smith* and *Hazlewood v. Pope*; for those cases, it is presumed, are referrible to other principles infinitely better able to sustain them.

Correction of text.

(F) In the 4th edit. the statement of this case is much confused by the promiscuous intermixture of the letters B., C., D., and one E, a stranger. The facts too are incompletely developed; and the question, as above propounded, does not embrace the actual point in dispute. By Vernon's report it appears that B. died an infant, and that the question was, whether the residue of the personal estate, not particularly devised by the testator,

the whole frame of the will, was of opinion, that the personal estate was to be applied in the first place, in case of the real estate: First, because there was no express clause to exempt the personal estate, which had always been a distinction taken in the Court of Chancery. Secondly, because it appeared that the heir of this family was not to have the real estate till his age of twenty-five years; nay, not so much as the rents and profits, which should actually fall and become due, before that age; that the testator appeared throughout to carry a very frugal intention, and therefore would allow his heir no more than 25/- a-year for his maintenance, and that too carried beyond the usual time of his age of twenty-one years; for he was to be trusted with nothing more, even till his age of twenty-five years. Could it then be thought that he intended indefinitely to trust him with the personal estate, without limitation to any age, so that he might squander it all away, and waste it as soon as ever he came to it? that both the real and personal estate were in this case to come into the same hand, and, therefore, he could have no such frugal intention with regard to the one, and leave it so loose with regard to the other. And his Lordship decreed the personal estate to be subject, in the first place, to the debts and legacies.

[848]

So (d), where one devised all his lands, tenements, and hereditaments, in the counties of W. and M. to trustees, in trust by rents and profits, sale or mortgage, to raise so much money as would pay his debts, and interest for the same; and, after payment of his debts, that they should stand seised of such part of his estates as should remain unsold to and for such person and persons as should be entitled to his settled estate; and if any money remained after payment of the debts, the same should be paid to his daughter, or such other person as should be entitled to the said other estates, and he gave all his personal estate to his said daughter, and made her sole executrix: Lord Talbot decreed the personal estate to be applied in the first

Devise to trustees to pay debts, and residue to daughter, to whom personal estate is given, and she is made executrix. Personal estate first liable.

[849]

(f) *Hazlewood v. Pope*, 3 P. Wms. 323. [S. C. For. 204.—*Ed.*] Et vide *Dalman v. Smith*, *supra*, 846.

should go to the administrator and representative of B., exempt from the payment of the said testator's debts and legacies; or whether the personal estate, not particularly devised, should be applied to pay these debts and legacies in exoneration of the real estate? And it was contended, that if such residue of the personal estate were applied in exoneration of the real estate, that then it would be wholly exhausted, and the devise of it to B. become idle and vain. See 2 Vern. 740. The judgment then proceeded as above.

place to the payment of debts. His Lordship chiefly grounded his opinion upon the circumstance, that the same person was devisee of the personal, and also devisee of the surplus of the real estate in tail; for he could not think it was the intention of the testator to exempt his personal estate from his debts, for no other reason, but that his daughter might dispose thereof by her will, under her age of twenty-one, on purpose to leave the real estate of the testator, and which was settled on herself in tail, the more incumbered.

Same case.

[850]

So, in the case of *Harewood v. Child(m)*, where the words were, "I devise all my manors to A. and B., and their heirs in trust, that they and their heirs, out of the rents and profits, or by lease or mortgage, or sale thereof, or any part thereof, shall raise so much money, as I shall owe at my death; and after payment of my debts, and reimbursing themselves upon farther trust, that they and their heirs shall stand seised of such part of the premises as shall remain unsold, to and for such persons and uses as the manor of C. is already settled, and if any money remains after payment of my debts, it shall be paid to my daughter, and such as are entitled to the said manor, by the limitations aforesaid." He had already given the manor of C. to his daughter in tail, with remainder to his nephew, and then he gave all personal estate, of what nature or quality soever, to his daughter, whom he made executrix, and it was held, that notwithstanding this express devise to the trustees, the personal estate should be first applied in discharge of the real.

Last case decided not on any particular ground, but on view of whole will.

[851*]

Lord Talbot himself states the ground on which he determined this case, in that of *Stapleton v. Colville(n)*. He says, the opinion of the Court was founded upon the contemplation of the will, which being taken together, manifested the intent to be, that the daughter should take the personal estate, liable to the payment of his debts, she herself being devisee of the whole; and it would have been absurd to imagine, that the testator meant his personal estate to be exempt from the payment of his debts, when he had expressly provided, that the surplus of the produce of what should be raised out of the

(m) Cited Ca. temp. Talb. 204, corrected from Reg. Lib. 1 Cox. 7. —Ed.] This seems to be the same

case as that last cited.

(n) Ca. temp. Talb. 208, postea, 875.

* The residue of this page may be found postea, p. 803, of this edit.

real estate, should go to the same person, who was devisees in tail of the real estate (c).

The principle upon which courts of equity proceed in all these cases is, that the testator's intent must govern the construction of his will. The barely charging a man's real estate with his debts, or conveying them to trustees in trust to pay his debts, does not evince a design to exempt the personal estate primarily charged therewith, or at least it is not in point of law conclusive evidence to that extent, because the personal estate is positively liable in equity, independent of the will; it therefore requires negative words in the will, or something tantamount to rebut this conclusion of law, and exempt the personal estate; but the merely rendering another fund liable, implies no such intent; for, *primâ facie*, it imports nothing more than the testator's intent to render his real estate liable as an accumulative fund, in case of any deficiency in the fund primarily liable; nor does the gift of the personal estate to one constituted executor in the same breath, amend the case; because in doing that, the testator only makes a positive disposition of the property there, where the law would have thrown it, had nothing been said; it is therefore only *expressio ejus quod tacite*

[838*]
Charging real estate with debts, no proof in equity of intention to exempt personal fund,—to do which negative words are requisite.

[839]

* For the former part of this page see *ante*, pages 794 & 795, of this edit.

(G) It may here be in order to notice the case of *Samsell v. Wake*, 1 Bro. C. C. 144, which appears to have been determined on the principle of the preceding case, and not noticed by the author. The will in that case was couched in this language:—"I desire that my debts and legacies shall be paid, and for that purpose, I charge all my estates with the same, and that it may be more easily done, I direct, that Sir W. W. and J. H. (the defendants), and their heirs, shall sell the estate, and apply the money in payment of my debts and legacies, and that it may be lawful for them to pay the same out of the rents and profits or to raise the money by mortgage." And subject to the debts and legacies, the testator devised the said premises to the plaintiff (his natural son) for life, with remainders over: he then gave several pecuniary legacies, and gave the residue to the plaintiff. The plaintiff filed this bill to compel the trustees to pay the debts and legacies out of the real estate, insinuating that he took the personal estate exonerated of them. For him, it was contended, that from the frame of the devise, the testator seemed sedulous to throw the burthen of the debts and legacies upon the real estate, and to exempt the personal fund; but the court, stopping the counsel for the defendants, observed, "It is very clear there is not enough here to exonerate the personal estate. The personal estate is the proper fund,—in order to exempt it the testator must express his intent. It is not sufficient to charge the real, but he must shew that his purpose is, that the personal should not be applied. The words to be attended to are those relative to the personal estate. [S. P. 1 Meriv. 220.—He gives pecuniary legacies, and then by a very loose clause gives the residue to the plaintiff. The court is then called upon to construe the most large and loose residuary clause that ever was seen in such a way, as to change the natural order of payment. Where the intent has been strongly expressed, and it has been for near relations, old cases have carried the matter further than good sense, without precedents, would have done, but none of the cases apply to the present. Therefore, the personal estate must be first applied to the payment of the debts and legacies."

That debts may be more easily paid devise to trustees to sell, &c. remainder to A. for life remainder over. Bequest of residue of personality to A. no exoneration of natural fund.

Discharge of personal estate to be attended to only.

inest. The two circumstances, taken together, cannot furnish any inference beyond that, which the strongest circumstance viewed distinctly would reach, and neither circumstance taken separately is sufficient to rebut the equity in favour of the heir.

Whatever executor takes as such liable to debts.

[840]

Devise to C. "he paying 100l. to executor." The 100l. liable to debts (H).

And wherever an executor takes a sum of money, *qua* executor, whether such a sum be payable out of a personal or real estate, it will be liable to exonerate his testator's real estate from debts.

Thus (f), where one devised 100*l.* and all his books to A. and B., whom he afterwards made his executors, and gave a copyhold estate to C., he causing to be paid to his executors the sum of 100*l.*; and, *after payment of debts and legacies*, gave the residue and remainder of all his estate, freehold, copyhold, leasehold, plate, rings, stock, &c. to the Governors of the Foundling Hospital, and their successors for ever; one question was, whether this 100*l.* should be subject to the testator's debts? *Et per* Lord Hardwicke, Chancellor, the first question is, in what capacity the executors take? For if they take in the capacity of executors, the money must go for the purposes in the will. And I am of opinion they take as executors; any other determination would break in on an established rule, and make a precedent of bad consequence, by saying, that when they take barely by the name of executors, they shall take for their own use. In every case where real estate, or a sum of money out of it, is given by the name of executors, it shall be considered as given in that light, and for the purposes of the will, and this is consonant with other cases applicable to the office of executor, which are as strong as the present. For instance, the lands of a villain are assets, so was the villain himself; therefore what comes as accruer from him must be assets. Though the executors had died before the testator, it would have been a good bequest of this 100*l.* charged on this copyhold for the purposes of the will, so far as it could take effect, that is, for debts and legacies; and if one of them should die, it would survive to the other, and there is no determination to the contrary. It must therefore be considered subject to that duty, which is upon them by their office; and it is material that when he

[841]

(f) *Arnold v. Chapman*, 1 Ves. 108.

(H) For the late cases on this division of the chapter, see the note to p. 903, *postea*, sec. I.

speaks of them with relation to their office, he calls them executors; where he gives to themselves, he calls them by their own names.

But, as we have observed, if there be express words, or a plain necessary implication arising from the words of the testator, or deducible from the manner in which he disposes of his property, of his intention to exempt his personal estate from his debts, and to substitute the real in the room of the personal estate, *this he may do, and the law will support him in it.*

Personal estate may be exempted from debts by express words, or obvious implication.

[842]

First, it may be done by express words, which may be either positive, or implying a negative.

By express words,

By positive words (g), as if a man devise lands to be sold for the payment of debts and legacies, and *will that his personal estate shall not stand or be charged or liable thereto*; or if the devise for sale of lands for the payment of debts be general, and the testator afterwards devises all the rest and residue of his personal estate, *having already made provision* for the payment of his debts and legacies out of his real estate, or out of such particular lands, or such like clauses; in these cases the real estate, so subjected, shall not be exonerated by the personal.

Positively exonerating personal fund.

Thus, where Sir William Leman (h), possessed of a real and personal estate, the former incumbered by several mortgages of his ancestors, made his will, in which was inserted this particular clause: "I desire all my debts may be discharged by my executors, I mean those only of my own contracting, not those heavier debts charged by my family;" and, after giving several legacies, gave his personal estate to his mother, whom he made executrix, desiring her to pay all his just debts exactly; the mother, after the making the will, bought in the mortgages, which were assigned to her, and for the payment of which the son entered into a covenant. He died in 1741, there having been no payment or demand of principal or interest for twenty years (i). In 1744 the mother brought a bill against the present plaintiff and defendant L. and N., who were the co-heirs at law of her son, for payment of the mortgages, or else to foreclose. Afterwards, she dying, made L. one of the co-heirs, her executor, who got his name struck out of the original, and

Testator desires his executors to pay debts, adding "I mean those only of my own contracting, not those heavier debts charged by my family." This exempts personal estate from heavier debts.

[843]

(g) Per Lord Harcourt, Keeper, (h) *Leman v. Newnham*, 1 Ves. 51. Gilb. Eq. Ca. 73. 74.

(I) As to this point, see antea, vol. i. p. 392, of this edition, in notis.

[844]

Will to be construed so as one part do not contradict another.

now brought a bill of revivor against the other co-heir for a sale of the mortgaged estate; and that, out of the money arising thereby, the principal and interest due should be paid by N. the defendant: the plaintiff claiming by a double right, as executor of the mother, who stood in the place of the mortgagee, and as co-heir of her son; one question was, out of what fund these mortgages were to be paid? And it was held by Sir William Fortescue, Master of the Rolls, that the will, by which it was agreed that he had a power to charge his real or personal estate with these mortgages, was the proper rule to go by, as far as it directed; so that the question was, whether, and how far, it had done so? It had been insisted, that the personal estate, being the proper fund, could not be discharged without particular words; and that, therefore, though there was a direction for payment of the debts out of the real estate, that would not change the fund, but would only make good any deficiency of the personal estate. That was the general rule; but here there were express words of exemption. It had been said, that, though there was this exemption in the first clause, it was not in the latter, where the testator directed all his just debts to be paid exactly. In answer to which the Court said, it was a constant rule, that one part of a will was not to be construed contradictory to another, if both would stand; and, when the testator had so particularly explained what he meant by his debts, it would be hard to give it a different construction (K).

[845]

Charge of real estate with debts, so that personality may go clear to legatee, an exemption of personal fund.

By words implying a negative (i). As where M., seised in fee of lands, devised them to his wife for eighty years, if she should so long live, and afterwards to trustees for ninety-nine years in trust, that by the perception of the profits, or by the

(i) *Lady Anne March v. Fowke*, Finch's Rep. 414.

Debts contracted after date of will must be paid (as well interest as principal) out of fund charged therewith.

(K) The report continues, "It is further objected that the mother's buying in those mortgages, and the son's covenanting for the payment of them was after making the will, whereby he made them his own debts, and they no longer came within the description of his heavier family debts. But the will must be made to speak from the testator's death, and be looked upon, not only as his last will, but last words: so that where a will charges a real or personal estate with debts, any debts contracted after are equally liable to be paid. Wherefore, though by the covenant he makes himself liable to her representative, yet that does not vary the description of the thing given by the will. So that the testator having discharged his personal estate, they [the heavier debts] are a charge upon the real: and only those contracted by himself charged on his personal estate: this also determines the objection as to interest, which was said to become his own debt; but that as well as the principal is within the description of heavier debts; for it would be strange to charge them upon separate funds."

sale of the said estate, they might pay his debts with remainders over; and devised to his wife all his plantations in Nevis, and his negroes, servants, goods, stock, and all his *personal estate whatsoever to her own use, having charged his real estates for the payment of his debts, that his personal estate might come clear to her*, and made her sole executrix and died: a bill in Chancery was exhibited by the wife, to enforce the trustees to sell the lands, or so much thereof as would be sufficient to raise money for the payment of the debts; or that, if she should be compelled to pay them out of the personal estate, then that the lands might be conveyed to her to reimburse her. It was contended, that *the personal estate ought in the first place to stand charged*, and not the real, until the personal should prove deficient. But the court decreed the trustees to execute the trusts by sale of the lands appointed to be sold to pay the testator's debts.

Secondly, from the general frame and scope of the will, as displaying a manifest intention of the testator to exempt his personal estate.

[846*]
Exemption by
manifest im-
plication.

Thus, if the *whole* personal estate be given, in some sort, as a specific bequest, and there be a provision for the payment of debts out of the real estate, and the consequence of charging the debts on the personal estate, will be to exhaust the whole of it, the personal estate will be exempted; because, in such case, it is presumed, that the testator meant some benefit to the legatee, to whom he has given his *whole* personal estate.

[851†]
General rule.

The case of *Bamfield v. Wyndham*(o), is an instance of this sort. There I. S. devised all his manors to trustees and their heirs, in trust immediately out of the rents and profits, or by sale or mortgage of the premises, or any part thereof, to raise and levy money for payment and satisfaction of all his just debts, with interest and charges of the trustees; and if there should be a surplus of lands or money, that to be to his sisters jointly, and their heirs; and *all his personal estate* to his dear wife,

Devise of money to pay debts. Bequest of "all personal estate" to wife (the executrix). Debts amounting to more than whole personal estate, an exemption of that fund (L).

(o) *Bamfield v. Wyndham*, Pre. Ch. 101, et vide 3 Ves. 105.

* For the residue of this page see antea, pages 795 and 796, of this edition, and for the intervening pages between 846 and 851, see antea, 796 to 798 inclusive, of this edition.

† For the former part of this page, see antea, p. 798, of this edition.

(L) Now otherwise, see postea, 854, *in notis*; and for further observations on this case, vide antea, p. 793, et infra, 804, of this edition.

[852]

whom he made sole executrix (M). The question was, whether the wife should have the personal estate exempt from debts, or whether that should be applied in the first place towards the payment of them? For it was urged, that the devise being to her who was made executrix, she should take it only as executrix. Lord Somers took notice, that the debts were more than the personal estate amounted to, and therefore the testator must mean, that the wife should have it exempt from debts, or he must mean nothing; and he said, there was in this case no room to make a different construction.

Bamfield v. Wyndham and French v. Chichester distinguished as to bequest of whole personal estate, and bequest of residue.

[853]

The reader should here be apprized of the distinction between the last case, and that of *French v. Chichester*, before-mentioned in this chapter (oo); for they approach each other so nearly in circumstances, that without the most cautious attention, they appear to have been decided in direct opposition to each other; for, in both cases, the legatee was the wife of the testator, and was made executrix in the same sentence in which the personal estate was given; and, in both cases, the personal estate was inadequate to discharge the debts, &c.; and, consequently, the legacies would be defeated if it was so applied; both cases are decided by persons of the first judicial authority, and yet the adjudications are different. But they appear to me reconcilable, upon the ground, that the case of *French v. Chichester* was a disposition only of all the testator's personal estate *not otherwise disposed of*, and so in the nature of a *residuary bequest*; whereas that of *Bamfield v. Wyndham* was a disposition of the *whole* personal estate of the testator as *one entire thing*, and so given specifically; and in that light it is considered by Lord Hardwicke, in the case of *Lord Inchiquin v. French* (p); and, if it be so considered, the circumstance that the legacy will be defeated, if the personal estate is not exempted, is a *material index* to the intention (pp); because it lets in a principle, which has great weight in the construction of wills of personal property, namely, that *prima facie* the testator intends a positive benefit to every specific legatee; which prin-

(oo) [Antea, p. 792, of this edit.—Ed.]

(p) Vide Amb. Rep. 38.

(pp) [Sed vide for a different opinion, infra, note (N).—Ed.]

(M) That the whole personal estate was in this case bequeathed, and not a residue, Lord Hardwicke said, in *Inchiquin v. French*, (1 Cox, 6.) made a very material difference. Lord Somers, however, does not appear to have noticed that circumstance. The case of *Stapleton v. Colville*, postea, 875, affords another instance where all the personal estate was bequeathed, which seems to have created some difficulty.

ciple does not apply to a residuary legatee, because, in our law, the residuary legatee is not so greatly considered, as he was in the Roman law, the residuum being taken with us as merely the gleanings of the testator's estate, and depending upon casualty, whether there shall be any such gleanings or not.

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The case of *Kynaston v. Kynaston* (q) must, I presume, have been also determined upon the principle, that, where the whole personal estate is bequeathed, and would be exhausted, if applied to exonerate the real, the presumption is, that it was meant to be exempted. In this case the testator, by his will, charged his estates with the payment of all his debts, legacies, and funeral expences; and, for that purpose, he devised particular lands to trustees, in trust to sell the same, and pay his debts, legacies, and funeral expences, and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate; and Lord Bathurst determined the personal estate to be exempt (N).

Bequest of whole personal estate, which debts would exhaust, evidence that it was meant to be exempt.

And this distinction, between a devise of the whole personal estate, and a devise of the residue, was also taken in the case of *Heath v. Heath* (r), where one, seised in fee of lands, and possessed of a personal estate, having children, and owing money, gave legacies by his will, and directed, that they should be paid out of his real estate, and gave his personal estate to his children. *Et per curiam*, if the legacies had been only charged upon the real estate, yet the personal estate should

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Legacies charged on real estate, whole personal fund given to A.—latter exempt from legacies; but not from debts.

(q) Cited 1 Bro. C. C. 457, [note, *infra*, *Adams v. Meyrick*. and S. C. 2 Atk. 627.] Sed vide (r) 2 P. Wms. 366.

(N) In *Samwell v. Wake*, 1 Bro. C. C. 145, it was argued, that the personality was very small, only about 500*l.*, and the debts so considerable, nearly 13,000*l.*, that they must swallow it up, and render the bequest totally nugatory,—a circumstance which had been relied on in the decision of a similar case, *Bamfield v. Wyndham*, Pr. Ch. 101, where the Lord Chancellor took notice, that the debts were more than the personal estate amounted to, and, therefore, that the testator must have meant his wife to have it exempted from his debts, or he could mean nothing. Nevertheless, Lord Thurlow said, it was very clear there was not enough in the case before him to exonerate the personal estate, and so decreed; see *antea*, 799, of this edition, n. (G). And this seems to be good law, for it appears to be now clearly settled that the intention to exempt must appear from the will itself, and cannot be collected from extrinsic circumstances. See *postea*, 952 to 956. The consequence is, that parol evidence cannot be read to explain the amount of the debts; and, therefore, whether they are of small amount or of great magnitude, the construction which the will would receive, without reference to that fact, will not be varied. Accordingly, in *Aldridge v. Wallescourt*, 1 Ball & Bea. 312, the circumstance of the personal estate being only 2,400*l.* and the debts 30,000*l.*, was held to have no bearing on the merits of the case. And this latter doctrine was approved by Lord Eldon, in *Blundell v. Beutle*, 1 Meriv. 229.

Modern rule, that amount of debts makes no difference in questions of this kind.

have been first applied to pay them, and so should it have been against a residuary legatee; but, in this case, the real estate being the fund appointed, and the *whole* personal estate given away by the will, *therefore* the legacies must be paid out of the real estate *only*; but the debts shall be still paid out of the personal estate, *the will not ordering the debts to be paid out of the real (o).*

Bequest of whole personal estate exempts it from debts, if real estate be charged therewith. Contra of bequest of residue.

[856]

The case of *Lord Inchiquin v. Lord Obrien*, is grounded upon this distinction, between a disposition of the *whole* personal estate, and a disposition of a *residue* only, in regard to the evidence they respectively furnish, as to the testator's intention with respect to the exemption of his personal estate.

Lord Thomond by his will (*inter al.*) devised in this manner (s): "As to my worldly estate, both real and personal, I dispose thereof as follows: First, I will that all my debts, which I shall owe at the time of my death, shall be paid;" (which was sufficient to charge his real estate with his debts, in case his personal estate had fallen short (P)) and then went on in his will, and devised, "his real estate to trustees, upon trust, that they should sell such a competent part thereof as should be sufficient for the payment of his debts and legacies." And his farther will was, "that the [whole] money to be raised by sale of his real estate, *should be deemed* [and taken to be part of his personal estate;] and then he gave all the rest and *residue* of his *personal* estate [of what nature or kind soever and where-soever being], *after payment of his debts* [funeral expences] *and legacies* [unto the said Murrough Lord O'Brien (ss)]. And the question was, whether the personal estate, *viz.* that part of it which was properly so, his chattels, should go to Lord O'Brien, discharged of the testator's debts and legacies. Lord Hardwicke said (Q), that there was no case, wherever it

(s) *Inchiquin v. Obrien*, 1 Wils. 82. [S. C. Amb. 33. 1 Cox, 1. Et vide this case observed on, infra, 897.] S. L. *Philips v. Philips*, 2 Bro. C. C. 273.

(ss) [The interpolations between brackets are from Master Cox's report of this case.—Ed.]

(O) As to the cases involving the question of exemption by means of a particular mortgage, legacy, or debt, being charged on the real estate, see postea, 878, text and note.

(P) *Chitty v. Williams*, 3 Ves. 545. *Shallcross v. Finden*, ib. 738. *Keeling v. Brown*, 5 ib. 359.

Immaterial how debts are charged on real estate.

(Q) "By law and equity, to be sure, the personal estate is the proper fund to be first applied in payment of debts; and with regard to the ecclesiastical laws, it is the only fund for payment of legacies. If the personal estate is to be exempted from debts and legacies, it must be either by express words, or from a necessary implication, shewing the plain intent of the testator; and it need not be by express words, where, without them, the

was pretended, that the personal estate was exempted, where the *rest* and *residue* was given in this manner, namely, "after payment of my debts and legacies;" and the meaning of the testator must have been, that in case his personal estate should fall short, then that a competent part of his real estate should be sold: but to take off the force of this reasoning, it was insisted, that by these words in the will, "*And my farther will is, that the whole money to be raised by sale of my real estate shall be deemed as personal*;" the testator meant, that so much of his real estate should be sold, as should be equal to his proper personal estate, and should be added to the same, and that out of that aggregate fund, the debts, &c. should be paid, and after payment out of that aggregate fund, the residue should go to the residuary legatee; but his Lordship saw no foundation for this construction; for it was never heard of, that because a residue of a personal estate was given, that, at all events, some residue must pass by the will, for no man could tell at the time of making his will, how his personal estate might be increased or diminished, or how long he might live. So he decreed the personal estate to be first chargeable with the debts and legacies.

[857]

For it does not follow that because a residue is given, a residue must pass (x).

A similar decision was made by Lord Northington against the interest of a *wife*, being a residuary legatee, in the case of *Stephenson v. Heathcote* (t). There one devised lands in trust,

[858]

Devise to pay debts. Bequest of a trinket to A. and residue to B. Personal estate first liable.

(t) Cited 1 Bro. C. C. 458. Observed upon, 3 Ves. 106, [and introduced on other points, *infra*, 956.—*Ed.*]

intent of the testator plainly appears. And where the personal estate is exempted from debts and legacies, it must be given in the nature of a *specific bequest*; and in such case, another fund must be applied for the payment of the debts and legacies; every man having a right, as amongst his representatives, to subject what part of his property he pleases to the payment of his debts and legacies; and, I think, there is no substantial difference how the debts are charged upon the real estate, whether charged generally, or whether with directions to sell out and out, for in every one of these cases you will find the personal estate has been given in aid; therefore it will be impossible to lay down any settled and certain difference. The case of *Harwood v. Child* [antea, 849], is the first that ever came before the court, where it was contended, that the *residue* of personal estate should be exempt from debts, where the very express devise was after payment of debts, legacies, and funeral expences, and I own I did not expect to see it now. To take off the force of these words, it has been contended, on behalf of the plaintiff, that this residue means only the residue of the said fund which the testator ordered to be raised, and which he calls his personal estate; but there is no foundation for that construction. The words of the will, and not the circumstances of the testator, are to guide courts in their constructions; and they will not say, that because a testator devises a residue, he necessarily meant that something should pass by that residue." His Lordship was, therefore, of opinion, that the personal estate should be first applied in discharge of debts and legacies, and so decreed. See 1 Cox Rep. 4. 5. 8. 9.

Courts guided by words of will not by testator's circumstances.

(R) "The residue of personal estate does not mean much; it is as it may happen,"—per Lord Rosslyn, in *Tait v. Northwick*, 4 Ves. 824.

by sale or mortgage, to raise so much money as should be *fully* sufficient to pay all his just debts, and then gave a silver tobacco-box to A. B., and gave all the *residue* of his personal estate to his wife, and made her executrix; and Lord Northington ordered the personal estate to be first applied (s).

Residue of personal estate may be exempted from debts by implication, as well as whole personal fund.

Court not to inquire into amount of personal estate, whether sufficient or not to pay testator's debts.

Effect of word "fully."

Testator could not intend to prefer wife to disinheritance of children.

(S). The case of *Stephenson v. Heathcote*, as recently reported by Mr. Eden, supports a position widely different from that deduced from it in the text. The distinction between a bequest of the personal estate, and a bequest of the residue, where such residue comprehends the bulk of the personal property, was denied to be law, and it was incidentally held, that a bequest of the residue of personal estate, might, as such, be exempted from the payment of debts by implication, as well as a bequest of the entirety of that fund. It appears by the above report of this case (1 Eden, 38 and 43. S. C. 1 Meriv. 224, cited, in addition to circumstances mentioned in the text), that the testator left a personal estate of the value of 700*l.*, and was indebted on mortgage about 1500*l.* besides other debts. One question was, whether the personal estate should be exonerated from the payment of debts and funeral expences? Lord Northington said, the ruling principle in the construction of wills was, that the court was bound to find out the intention of the testator, if it were possible so to do, however inartificially the will might be expressed. But this intention was to be discovered from the words of the will itself, and not from extrinsic circumstances: and the court must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man might be imagined to do in the testator's circumstances. Enquiries into the amount of the personal estate, to know whether it were or were not sufficient to pay the testator's debts were immaterial, because such enquiries would establish a rule, that in every case where the personal estate was insufficient, it must be presumed to be the testator's intention to charge his real estate with the payment of all his debts. Besides, the personal estate was vague and uncertain, and subject to great fluctuations: few men knew what would be the amount of their personal estate. In the present case, the testator having constituted his wife trustee of his real estate for payment of his debts, appointed her also to be his executrix. But although he had given her power to sell his real estate, "fully to pay and satisfy his debts," this was no more than making his real estate auxiliary to his personal, and not to be applied in the first place. The word "fully" was of great force and effect: it was a word of reference, and shewed that the devise of the real estate was intended to be only in aid, according to the rules of law. The personal estate was to be first applied, unless it appeared to be the testator's clear intention to exempt it, and to throw the debts wholly on the real estate. And Lord Northington agreed with the determinations in the cases cited, that there was no need of express words in a will to exempt the personal estate from payment of debts, if the intent did otherwise appear; but he could not see any words in the will before him which indicated such an intention. As to the residuary clause, his Lordship looked upon the gift of the tobacco box as nothing. An argument had been drawn from that, and the gift of the rest of the personal estate to the wife, that the testator's intention was to make the land the primary fund; but the personal estate might be given by the word "residue" as well as by words expressing "all the personal estate." Unfortunately for that construction, the clause did not end at the words "for ever," nor did it go on to say (as it should have done if that had been the intention) "for her own use;" but instead of that the testator added, "whom I make my executrix," which was a kind of legal trust: it was a devise to her as executrix. Another thing which had great weight with Lord Northington was, that the testator's principal object was a provision for his children. He could not be supposed to have so far preferred his wife to his children as to have given her the whole personal estate, free from the payment of debts, and to have thrown the entire burthen of them upon the estate to which he intended his children should become entitled after his wife's decease. And the event of his leaving no children was not to be

Although the single circumstance of the personal estate being devised to the wife by way of *residue*, seems not of itself to be sufficient to exempt it from exonerating a real estate devised for payment of debts, yet the circumstance of a wife or child being concerned, has generally induced a strong bias on the side of such a construction of the whole will, as will be favourable to an exemption of the personal fund; and therefore the Court of Chancery, especially of late years, since the feudal notion of favouring the freeholder has been growing weaker, and yielded to the more rational principle of complying with the intention of the owner of both funds, has laid hold of slight circumstances, raising minute shades of distinction, added to the presumption furnished by that of the legatee standing in so favourable a relationship, to take such cases out of the general rule.

From near relationship of husband, wife, and child, presumed that will was intended to operate most favourably for them.

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The case of *Adams v. Meyrick* (u) furnishes an instance of this kind, and may be considered as the leading authority on this head.

There A., by will, gave several pecuniary legacies, and after devised lands to trustees and their heirs, in trust, that they DID and SHOULD by mortgage or sale of the said premises, or any part thereof, pay and satisfy his debts, and the said legacies and funeral expences; then he devised all his goods, chattels, and household-stuff, in such a house, to another; and then went on in these words: "*All the rest and residue of my personal estate, I give and devise to my wife, whom I make sole executrix.*" *Per curiam*, the residue of the personal estate belongs to the wife, in the nature of a specific legacy, exempt

Words "do and shall pay debts out of real estate," held sufficient to exempt residue of personalty given to wife (T).

(u) 1 Eq. Ca. Abr. 271, pl. 13. [S. C. 2 Atk. 626.] N. B. This case is said by Lord Hardwicke, [2 Atk. 626.] to be a weaker case than that

of *Walker v. Jackson*, infra, 873, [et per Lord Alvanley, "*Adams v. Meyrick*, is a very weak case," see postea, p. 896.—Ed.]

alone attended to. Lord Northington was therefore of opinion, that there was not sufficient in the present will to exempt the personal estate.

The learned author, in a subsequent note, conceives this case to be erroneously determined; see postea, 860, n. (y). By the above report, however, it is clearly referrible to substantial grounds. And the case which it opposes was acknowledged by Lord Hardwicke to be a weak authority. See supra, author's n. (u).

(T) The argument raised on the words "did and should" is certainly very refined, and such as would not, it is conceived, at the present day, be attended to. This case, and that of *Stephenson v. Heathcote*, supra, 858, are at variance. The learned author, by his note (y) in the next page, appears to be of opinion, that this case is entitled to preference; see vide the report of *Stephenson v. Heathcote*, as supplied by Mr. Eden, and furnished in the preceding note.

[860] from debts, legacies, and funeral expences; for though the personal estate is the natural fund for them, yet here he has expressly provided another for that purpose, by words of an imperative signification, "*that the trustees do and shall,*" (x) which is stronger than a bare charge of them on his real estate, and might be intended only auxiliary to his personal estate, which will, without words of exemption, be liable, in the first place; and though the words "*rest and residue of his personal estate*" are generally understood rest and residue after debts, legacies, and funerals, yet, here, they are relative to the last antecedent of the devise of his goods, chattels, and household-stuff, at such a house, and pass to his wife as a specific devise, *in the same manner as the next preceding devise did* to the devisee thereof, and are to be understood *the residue of what he had not before particularly devised*, not the residue after debts paid (y).

[861]
Personal estate, or any part of it, given as a specific legacy, not liable to exonerate real estate in mortgage, as between heir and legatee.

If the personal estate, or any part thereof, be given as a specific bequest, the heir or devisee of the real estate, will not be entitled to be exonerated by the personal estate or such part of it as is so given.

The case of *O'Neal v. Mead* furnishes an instance of this kind, in respect of chattels real (z). There, A. seised in fee of a real estate, which he had mortgaged for 500*l.*, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and then died, leaving debts which would exhaust all his personal effects, except the leasehold given to his wife. The question was, whether, there being (as usual) a covenant to pay the mortgage-monies, the leasehold premises, devised to the wife, should be liable to discharge the mortgage? And the Master of the Rolls, after taking time to consider of it, and being attended with precedents, decreed, that as the testator had charged his real estate by this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and that, though the mortgaged pre-

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(x) Vide *supra*, *Stephenson v. Heathcote*, which, though very similar to this case, is decided the other way.

(y) But this case may be supported on the same ground as the case of *Bradnox v. Gratwick*, *infra*, 809, viz. that the devise of the specific and residuary legacy is in the same breath; and which principle, also,

seems to me applicable to the case of *Stephenson v. Heathcote*, which, I take it, was erroneously determined. [See *antea*, of this edition, p. 809, in *notis*, for a different opinion.—*Ed.*] Et vide *Wainwright v. Bendlowes*, as reported, 2 Vern. 718. [S. C. *postea*, 883.—*Ed.*]

(z) 1 P. Wms. 693.

mines were also specifically given to the heir, yet, in this case, he to whom they were thus devised, must take them *cum onere*, as probably they were intended to pass.

Even money may be specifically devised, but then it must be under such circumstances of locality, and in such a situation, that the legatee may identify it, and say that he has a right to that *very* money in specie (v); for it is of the essence of a specific legacy, strictly speaking, that, by the assent of the executors, the property, in the identical thing, will immediately vest, and not remain fluctuating, until the arrangement of the testator's affairs; for, if that be necessary, it is not a specific legacy.

Thus, where the testatrix devised 400*l.* to the plaintiff S., to be paid to him out of 500*l.*, secured by a statute, &c. by C., and made the defendant B. her executor; on a bill brought by

Money may be specifically bequeathed.

*Bequest of 400*l.* part of 500*l.* due on a statute, a specific legacy (v).*

(V) As for instance, the bequest of a sum of money deposited in such a chest, or in such a person's hands, or in such a trunk or bag. *Lawson v. Stitch*, 1 Atk. 508, and cases there cited, by Mr. Sanders.

(U) The difference between specific and pecuniary legacies consists in this:—Pecuniary legacies must abate proportionably, to the exhaustion of the whole legacy, in case of a deficiency of assets to pay the testator's debts and general legacies. Whereas specific legacies abate only *inter se*, to pay debts, when all the personal estate, not specifically bequeathed, has been administered; but, on the contrary, they have this disadvantage, that if the specific funds fail, the specific legatees will be entitled to no contribution from the pecuniary legatees, nor to have the deficiency made up out of the general assets. *Sleech v. Thorington*, 2 Ves. 561. *Ashton v. Ashton*, 3 P. Wms. 385. If, therefore, stock specifically given to be sold by the testator, or supposing the specific legacy to consist of a lease, the testator be evicted, or of goods, and they be consumed, or of a debt, and it be lost by insolvency of the debtor,—in all these cases the specific legatee will not be entitled to contribution from the other legatees; and not being so entitled the courts say he shall not be liable to contribute towards the payment of their legacies in case of a deficiency of the funds on which such legacies are charged. *Long v. Short*, 1 P. Wms. 403., and see 2 Black. Com. p. 512. On this account there is a leaning against construing a legacy to be specific, (*Ellis v. Walker*, Amb. 310; and see *Webster v. Hale*, 8 Ves. 413, and *Simmons v. Vulture*, 4 Bro. C. C. 349), since, contrary to the probable intention of the testator, it often proves a hardship upon the specific legatee, who by an alteration of a part of the property, may find nothing that answers the description; and it often proves hard also on other legatees where there happens to be a deficiency. It is a rule, therefore, that no legacy is to be held specific unless clearly so intended; see *Sibley v. Perry*, 7 Ves. 529. *Att.-Gen. v. Parker*, Amb. 568, and *Ashburner v. McGuire*, 2 Bro. C. C. 108. Another source of difficulty is, that a specific legacy vests immediately upon the death of the testator, and, unlike a pecuniary legacy, carries interest from his death. *Barrington v. Tristram*, 6 Ves. 345. And it may be here observed, that the court determines upon the face of the will, whether the legacy is specific or pecuniary, and does not, it seems, look into the account of the effects to see whether that shall be turned into a specific legacy which upon the face of the will is to be taken as pecuniary. *Innes v. Jackson*, 4 Ves. 573. See vide *Fonnerau v. Pointz*, 1 Bro. C. C. 472, and *Page v. Leapingwell*, 18 Ves. 463. To authorize a departure from the words of the will, it is not enough to doubt whether they were used in the sense which they properly bear, but the court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what

Specific and pecuniary legacies distinguished.

S. against B. for payment of the money (a), the question was, whether this was a specific legacy? And it was held so to be; and decreed to be paid to the plaintiff.

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So is bequest of money on bond held in trust for testator.

So, where I. S. having money secured to him by bond, in the names of A. and B., in trust for himself, devised it; the court held, that the devise of this sum of money was a specific legacy (b) (w).

(a) *Smallbone v. Brace*, Swinb. 28. Finch, 303.

shaw, 1 Eq. Ca. Ab. 298, pl. 2. [S. C. on other points, Pr. Ch. 99.—Ed.]

(b) *Lord Castleton v. Lord Fanshaw*.

the sense is in which they were meant to be used. *Att.-Gen. v. Grote*, 5 Meriv. 321. With respect to *Fonnereau v. Pointz*, the Master of the Rolls, in *Att.-Gen. v. Grote*, observed, that Lord Thurlow was struck with the enormous disproportion between the stock the testatrix had, and what, by the construction which was contended for, she must have been taken to have given; the latter being ten times as much as the former. In a case precisely the same, the Master of the Rolls said he might be disposed to follow that precedent, although, even there, it was not without great difficulty that the court was prevailed upon to admit the extrinsic evidence as to the state of the property in order to explain the intention of the testatrix, see 3 Meriv. 319.

Distinction between bequest of bond and money due on bond, exploded.

(W) A distinction has been taken between the bequest of a bond or other security, and the bequest of a sum of money due on a bond or other security. The bequest of a bond has always been held to be a specific legacy. But Lord Camden appears to have been of opinion, that if a sum of money due on a bond be given to A., it will not be a specific legacy. *Attorney-General v. Parkin*, Amb. 566. Lord Thurlow, however, thought the distinction between "I bequeath the sum of 500l. due on a bond from A. B.," and "I bequeath the bond from A. B.," too slender to be relied on. *Ashburner v. McGuire*, 2 Bro. C. C. 111. In *Chaworth v. Beech*, 4 Ves. 566, the Master of the Rolls observed, that Lord Camden, in deciding the case of *Att.-Gen. v. Parkin*, proceeded on this idea, which was substantial, that the testator did not mean any particular mortgages, bonds, and securities, but any mortgages, bonds, and securities that he might happen to have; if so, that was sufficient to sustain *Att.-Gen. v. Parkin*, without holding that *Ashburner v. McGuire* had overturned it, which Lord Thurlow did not mean to do, though he intimated his doubts. But *Ashburner v. McGuire* established this, that if the legacy is meant to consist of the security, it is specific; though the testator begins by giving the sum due upon it. It would be time ill spent, his Honour said, to go over the cases commented on by Lord Thurlow. He should therefore only further observe, that Lord Thurlow mentioned *Castleton v. Fanshaw*, ubi supra, in the text, in which the legacy of a debt was held as much specific as the devise of a farm. If that case were accurately stated (and it was in a very good book, and also in Pr. Ch. but upon another point) it was an authority perfectly conclusive upon the subject, and fully sufficient to warrant *Ashburner v. McGuire*, and upon a very attentive perusal of that case, the Master of the Rolls declared himself to be of opinion, that it was put upon a ground that could not be mistaken, [namely,] that such a legacy, unless there is a ground for considering it a legacy of money, and that the security is referred to only as the most convenient mode of paying it out of the assets, is as much specific as a legacy of a horse, or a cow, or any moveable chattel whatsoever. Therefore, upon the authority of *Ashburner v. McGuire*, with all the inclination he felt to support the legacy in the case before him as a pecuniary legacy, his Honour was of opinion, that though the gift was of money due on a note, yet that it was a specific legacy.—See also *Fryer v. Morris*, 9 Ves. 363, where the legacy was of money due on a note. Sir W. Grant's observations on that were:—"It is said this is a pecuniary legacy as it is a bequest of the money to be received, but that is the case of every bequest of a debt;" et vide further *Roberts v. Pocock*, 4 Ves. 150. *Kirby v. Potter*, ibi 748. *Coleman v. Coleman*, 2 ib. 640. *Gillaume v. Adderly*, 15 ibi 384; and

Bequest of money due on note, specific.

Again, where the testator, having devised 3400*l.* to be laid out by his executors in a purchase of annuities, in the Exchequer, for ninety-nine years term, to be enjoyed by his wife for her life, *she releasing her dower*, and after her decease to go equally to his two daughters, bequeathed 1000*l.* a-piece to the latter, and died, leaving little more assets than would pay the 3400*l.*; the court held, that the legacy of 3400*l.* was specific, for it must be taken as the devise of an annuity, and therefore was a specific legacy (c) (x).

So is bequest of sum to be laid out in Exchequer annuities.

But here we must remark, that the devise of the personal estate must be clear, certain, and exactly defined, not loose and equivocal, or it will not operate so as to alter the ordinary course of applying assets; an infraction upon which the courts of justice view with a jealous eye, and never permit but where the intention of the testator (who had an absolute power over

Bequest of personal estate to alter administration of assets, viewed with jealousy.

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(c) *Burridge v. Brady*, 1 P. Wms. 127. Swinb. 21. Sed vide infra, 865, this case explained.

Acton v. Acton, 1 Meriv. 178. From the whole we may conclude that the above distinction is now exploded, and that the bequest of money due on a certain bond or mortgage is as much specific as a bequest of the bond or mortgage itself.

It may not be without its use to add, that legacies of stock in the public funds are usually considered as general legacies, and not specific, unless there is any thing in the will to shew that the testator intended to confine it to the stock he had at the time of his death. *Avelyn v. Ward*, 1 Ves. 425. *Purse v. Snoplin*, 1 Atk. 414. A gift, therefore, of "1000*l.* out of reduced Bank Annuities" has been held to be a pecuniary legacy, *Kirby v. Potter*, ubi supra; but see Lord Eldon's expression in regard to this case, in *Deane v. Test*, 9 Ves. 154. In like manner, where there was a legacy of stock in the 4 per cent. consols, a legacy to the same persons of "an additional sum of 2000*l.* more to be paid out of the 4 per cents.," was held to be a pecuniary legacy, *Deane v. Test*; and see *Petersburgh v. Mortlocke*, 1 Bro. C. C. 565, and even a bequest of "12,000*l.* of my funded property to be transferred, &c." was held to be a pecuniary, and not a specific legacy. *Lambert v. Lambert*, 11 Ves. 607. And if Bank Annuities are directed by will to be purchased out of personal estate, the bequest will be considered as a pecuniary legacy. *Gibbons v. Hills*, 1 Dick. 324. But it should be remembered that it hath also been held, that a legacy of "100*l.* long annuities stock," or of "my stock," or "in my stock," or "part of my stock," is a specific legacy. *Attorney-General v. Grotz*, ubi supra. *Sibley v. Perry*, 7 Ves. 522. *Ashton v. Ashton*, Ca. Temp. Talb. 152; sed vide *Wilson v. Brownsmith*, 9 Ves. 180.

Bequest of stock, a specific legacy, when.

(X) Lord Cowper's words were:—"The 3400*l.* shall have the preference, and if there be not assets enough to pay the other legacies, they must be lost. It is of some weight that these annuities are to go to the children after the wife's death, but especially as the wife is a purchaser of the annuities for her life, by her releasing her dower; and money ordered by will, or articulated to be laid out in an annuity, or in lands, is in equity looked upon as an annuity or land, and, consequently, to be taken for a specific devise; it is therefore to be preferred before a pecuniary legacy."—His Lordship's opinion in this latter particular, has since been over-ruled, and it now appears to be settled, that bequests of money to be invested in the purchase of lands or annuities are general legacies, and must therefore abate with pecuniary legacies. See *Hinton v. Pinke*, postea, p. 864, and *Hume v. Edwards*, 3 Atk. 693.

Bequest of money to be laid out in lands, or on annuities, not a specific legacy.

his property) to appropriate it otherwise is clearly expressed, or necessarily implied.

Bequest of money to be laid out in land, a general, not a specific legacy.

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Therefore (d), when the testatrix bequeathed several pecuniary legacies, and, amongst others, gave 1500*l.* to her eldest son, in trust, to lay it out in the purchase of land in fee, and to grant a rent-charge of 50*l.* *per annum* thereout, to his daughter, the plaintiff, M., the wife of H., for her separate use; but that, if her eldest son should refuse or neglect to lay out 1500*l.* in a purchase, and to grant this rent-charge, then he should have but 500*l.* of the money, and the remaining 1000*l.* should be laid out, as far as it would go, in the purchase of an annuity, for the separate use of the daughter: The question was, whether the 1500*l.* was a specific legacy? And, on the part of the plaintiff, it was insisted that it was; because it was ordered to be laid out in land, and consequently, was to be taken as a devise of land, by which means it was become a specific devise. But Lord Parker held otherwise; for, admitting the 1500*l.* legacy should be taken as land, the question would be, what the legacy was, or how much should be laid out in land? The legatee of the 1500*l.* could not say that she had a right *in specie*. Was it possible, supposing there had been, in the present case, 140*l.* of the testator's money laid upon the table, the legatee could say, that she had a right to this money in specie? If not, then it was no specific legacy. But, his Lordship observed, the will saying, that, in case of the son refusing or neglecting to make this purchase, then he was to have but 500*l.* of the 1500*l.* legacy, and the daughter the remaining 1000*l.*; therefore, he took the daughter to be a general legatee for 1000*l.*

Lords Macclesfield and Hardwicke's observations on Lord Cowper's doctrine in Burridge v. Bradyl.

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Lord Parker (afterwards Lord Macclesfield) in the last case, said, that though he could not come into the opinion of Lord Cowper, in the case of *Burridge v. Bradyl* (e), yet, if it were insisted upon, he had such a regard for the precedent, as cited, that he would see the decretal order; but this was not urged. But Lord Hardwicke, in delivering his judgment in the case of *Blower v. Morret* (f), explains the reason of this seeming difference of opinion between Lord Macclesfield and Lord Cowper, on the case of *Burridge v. Bradyl*, and confirms the law to be as was held by Lord Cowper in that case. His Lordship observed, that the reason Lord Macclesfield was not satisfied with that case, when cited in the case of *Hinton v.*

(d) *Hinton v. Pinke*, 1 P. Wms. 539. S. C. Swinb. 29.

(e) *Supra*, 863.
(f) 2 Ves. 420. 422.

Pinke, was, because, according to the book, there was a wrong state of it; namely, barely as though it were a gift of money to be laid out in land, without stating the circumstance, that it was given to purchase an annuity for the wife, *she releasing her dower*, which was the true foundation of that determination; for, his Lordship said, he laid no weight on what was mentioned besides by Lord Cowper as of some weight, namely, that the annuities were to go to the children after the wife's death, for that was only as to hardship; nor that it was directed to be laid out in land, which would not vary the case, for it would be still a pecuniary legacy, and must then abate in proportion. The strong ground was, that it was a purchase of the widow's dower, by giving her a sum of money in lieu and satisfaction of and upon her releasing it; and the wife might lay hold of that if she would. It was the same as if the testator had said, "I give A. 500*l.* on consideration that he conveys such an estate to my devisee or trustee."—A. has then an option to say, that is a contract, he closes therewith, and will make it absolute, and will part with that estate for that money, and then he will not be bound to abate in proportion with other legatees.

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And, if ever a residue of personalty should be so devised as to partake of the nature of a specific bequest, that will also be exempt from exonerating the real estate.

Residue specifically bequeathed, is exempt from debts if real estate be charged therewith (Y).

Accordingly, it is said to have been argued by the counsel at the bar, and not denied by the Court (g), that, if the testator's lands were subjected to his debts, and all the rest and residue of his personal estate were given to a stranger, *without any allusion to debts*, and the executorship *bequeathed* to the testator's wife, or any other person; there, the residuary legatee would be entitled to have the residue and surplus, so devised to him, exonerated and discharged of the debts; and, in such case, the real estate, expressly charged, or devised to be sold, would, in the first place, be wholly applied to the purpose, and the personal estate would only come in aid of the real so devised to be sold, to supply what the real estate fell short to make up the debts: for such bequest would operate in the nature of a specific bequest of such residue.

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And, in these cases, too much attention cannot be given to the mode in which the personal estate is disposed of, in respect

Mode of bequeathing personal estate should be attended to.

(g) *Gilb. Eq. Rep.* 72, 73, [et vide postea, 883.—*Ed.*]

(Y) The latest case on this head is *M'Leland v. Shaw*, 2 Sch. & Lef. 514, introduced in the first section of the note to p. 903, infra.

of the general disposition thereof; the relation between the particular and residuary clauses; the connection between the testator and his legatees; the object of the testator in giving his legacies; and other minute circumstances, which persons in the habit of inspecting wills of this kind will readily perceive; as trivial circumstances frequently implicate important facts, and furnish decisive evidence of a testator's intention to give the personal estate exempt or not exempt from his debts.

Personally viewed as an entire thing, and given in parts, residue specific, as well as parts.

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For instance, if a testator appears to have viewed his personal estate as an entire thing, and to have contemplated a positive and express disposition of the whole, and to have deliberated to what extent it should be charged, his disposition will be considered as in the nature of a specific bequest of an entirety, though given in several distinct parts; and therefore the several parts *with the residue*, in compliance with his intention, will be construed to make up the whole; and consequently the residuary, or sweeping clause, will not be taken in its ordinary sense, as the residue after payment of debts, but in a peculiar sense referrible to the preceding disposition, and involving all that is left, after taking out what has already been given.

Devise for payment of debts, if personal estate deficient, rents to be applied, residue to wife, held exempt from debts.

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The case of the *Attorney-General v. Barkham*, cited in the case of *Stapleton v. Colville*, furnishes an instance of this kind (*h*). There the testator devised in the following words: "For the just and true performance of this my last will, and for the payment of all my debts, I give and devise all my real estate; and as to the personal estate, which at the time of my death I shall be possessed of and entitled unto, I give the same unto my executor and executrix herein named, to defray my funeral charges and expences; and, if my personal estate shall fall short to discharge the same, then the remainder to be paid by my executors out of the first rents and profits of my real estate, as they shall become due after my decease, until payment be made of all my legacies, debts, and funeral expences, as aforesaid; and, if there be any surplus of my personal estate, that then my executor pay the same to my dear and loving wife;" and it was decreed, that the personal estate should go to the wife, discharged from payment of debts. The ground of which decision was by Lord Talbot said to have been, for that the testator had laid the charge upon the real estate, and then, taking up his personal estate, mentioned particular things

which he charged it with, from whence it was concluded that the surplus there meant, must be the surplus after the particular charges there specified.

It seems that upon the same principle (i), if a man were to devise his real estates in trust for, and charged with, the payment of his debts, legacies, and funeral expences, remainder in trust for A. B. in tail, remainder over; and then to devise *part of his personal estate* to go along with his real as *heir-looms* (k); and afterwards devised all the rest and residue of his goods, clothes, and personal estate, not before bequeathed, to A. B., and made his trustees executors, that A. B. would take the residue discharged from the debts; for, in such case, upon strict grammatical construction, rest and residue not before bequeathed, is properly referrible to the bequest which precedes, and then the residue being given to a person not properly affected with debts and legacies, there appears to be no reason to charge him therewith, by inference that it is to be, *after debts and legacies paid*.

Any other circumstances, evincing that the testator meant to shift the burden of his debts from the personal to the real estate, will produce that effect.

Thus, where A. gave several specific parts of his personal estate, and then gave part of his real estate in strict settlement (l), and devised the remainder of his real estate to trustees in trust, to sell for the payment of debts, and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates, and then gave the residue of his personal estate, not before bequeathed, to his wife; the court held, that she took it wholly exempt from the debts. The ground of which determination must have been, that the charge of the deficiency on the devised real estates was demonstration that the testator meant, that the personal estate should be exempted from the debts.

Again (m), where W. by will devised lands to trustees, to be sold for payment of his debts and legacies, and devised all the residue of his personal estate to his wife, and gave her also

Devise of estate in trust for, and charged with debts. Bequest of part of personalty as heir-looms, and residue to A. who is not executor. Residue exempt.

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Devise of part of estate, in settlement—of residue, for debts, with declaration that latter being deficient, former shall be applied, an exemption of personalty.

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Devise in trust to sell and pay debts. Bequest of residue of personalty to wife, and 600l. to her also, out of produce of sale. Personal fund exempt.

(i) Vide *Dolman v. Smith*, supra, 846.

(k) Pre. Ch. 453. Gilb. Eq. Rep. 128, where this proposition is countenanced. [See also *Wainwright v. Bendlowes*, postea, 883, for a case perfectly parallel; and for other cases where heir-looms have been devised; see *Brydges v. Phillips*, introduced

in the note to p. 903, postea. *Tower v. Rous*, 18 Ves. 137, and *Bootle v. Blandell*, infra, 903.—Ed.]

(l) *Anderton v. Cook*, 4th June, 1775, cited 1 Bro. C. C. 456.

(m) *Waise v. Whitfield*, 2 Eq. Ca. Abr. 374, pl. 22. 8 Vin. Abr. 237, pl. 19.

600*l.* out of the money to be raised by sale of the trust estate, and made her executrix; on a bill for an account of the personal estate, and to have that applied in the first place, Lord Harcourt, Chancellor, observed, that here was not only a devise over of the residue of his personal estate to his executrix, but that he gave her father the sum of 600*l.* out of the real estate, so that he did not think the residue of the personal estate sufficient for her; which furnished the strongest presumption imaginable of the intent of the testator, that his wife should have the residue of his personal estate, and on this ground dismissed the bill *quo ad* an account of the personal estate.

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Bequest by codicil, of personal estate not before disposed of to executrix, held a specific legacy, and inapplicable to debts, real estate being charged therewith.

Again (n), where one seized of divers real estates, and also possessed of a personal estate, devised that all his estate in L., or a sufficient part thereof, should be sold as soon as his executrix conveniently could for the payment of his lawful debts, and the legacies thereafter mentioned, and the expence of his funeral, &c. he gave to E. one annuity or yearly rent-charge of 200*l.*, to be raised out of all his estate not thereafter otherwise disposed of, in the county of N., to be paid her half-yearly; and then, after giving several legacies, lastly, he appointed the above-mentioned E. and B. joint executrixes of his will. *Afterwards*, and at a future time, the testator added these words to his will: "And I give and devise to them (the executrixes) *all my personal estate not hereinbefore devised*," and then he executed the will over again. The principal question was, whether the personal estate ought, in favour of the heir at law, to be applied in exoneration of the real estate? And Lord Hardwicke was of opinion that it ought not, for that there was a manifest plain intention to give the personal estate as a *specific* legacy to his executrixes, and to exempt it from his debts; because, after giving several specific legacies, he said, "Lastly, I appoint the above-mentioned E. and B. joint executrixes of this my will." If the testator had rested there, it was only making them executrixes, and the personal estate would have been applicable to exonerate the real estate; but the testator some time afterwards added the words, "and I give and devise to them all my personal estate, not herein before by me devised," and in a formal manner re-executed his will. This, his Lordship said, was an extremely strong circumstance

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(n) *Walker v. Jackson*, 2 Atk. 624. [S. C. 1 Serj. Wils. 24. Bunb. 302, and *infra*, 897, where it is cited and

observed upon by the Master of the Rolls.—*Ed.*]

to shew the intention of the testator, and indeed insurmountable(z).

So, where the devise of the residue of the testator's effects was made in the same sentence with a devise of specific legacies to the residuary legatee, this was considered by Sir Joseph Jekyll as a case of exemption.

In the case alluded to(o), one charged his lands with the payment of his debts, and gave some specific legacies, together with the rest of his personal estate, to his brother; in which case, forasmuch as the specific legacies would be exempt from the debts, as betwixt the devisee of the land and the specific legatee, so the court declared they could not sever the specific legacies from the rest of the personal estate; and since the testator equally intended that the residuary legatee should have the rest of his personal estate, as the specific legacies, therefore all the personal estate was held to be exempt from the debts.

And where the real estate was not only charged with debts, but an actual power was given to the executor by mortgage or otherwise, to raise such a sum as would be adequate to defray them, Lord Talbot was of opinion this circumstance clearly manifested an intent to incumber the real fund with the debts.

Thus(p), where one by will devised his lands to his wife for

Specific legacy and residue bequeathed in one sentence to same legatee a case of exemption.

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Estate charged with debts, with power for wife to sell and pay same, devise to N. he taking name, &c. Bequest of personalty to wife (executrix). Latter fund exempt.

(o) *Bradnox v. Gratwick*, 20th Nov. 1722, at the Rolls, cited 3 P. Wms. 323.

(p) *Stepleton v. Colville*, Ca. temp. Talb. 201. Et vide *Hale v. Brooker*, Gilb. Eq. Rep. 72, 73, a case prior in time, wherein a similar question arose on Sir Matthew Hale's will, wherein a like circumstance appears, viz. a power to lease lands for pay-

ment of debts; and it seems from Lord Hardwicke's citing this case as an authority in that of *Walker v. Jackson*, that it received a similar adjudication. Vide 2 Atk. 626, [and for the case of *Hale v. Brooker*, supra, 823, et vide what Lord Alvanley says of the principal case, postea, 896.—Ed.]

(Z) The observation made on this by Lord Thurlow, in the case of *The Duke of Ancaster v. Mayer* (MS. cited by Lord Eldon, 1 Meriv. 223) was, that the very circumstance here laid hold of to shew that the personal estate was to be exempt, was a circumstance on which other judges presiding in the Court of Chancery had relied, as affording the contrary conclusion. Lord Thurlow said, that Lord Hardwicke's reasoning on this point was far from being sound reasoning; and referred to *Stephenson v. Heathcote*, cited 1 Bro. 458, 466, observing, that he entirely concurred with the principle there laid down, viz. that the gift of personal estate to one who is appointed executor, is not to be considered as a legacy exempt from the payment of debts; and then added that there were twenty instances where the circumstance of giving to the executors had been turned to a purpose directly contrary to the use which Lord Hardwicke made of it in *Walker v. Jackson*. For this reason, Lord Thurlow concluded that the notion of deciding by precedent in questions of this nature must be abandoned; and that the court must, in every such case, abide by the clear intention;—which, indeed, all judges affected to go upon, but seldom agreed on the principles to be applied in collecting it.

Lord Hardwicke's reasoning in above case pronounced unsound by Lord Thurlow.

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life, *chargeable* with the payment of *two* annuities for the lives of the annuitants, and likewise with a legacy of 1000*l.*, and gave her a *power* to raise, by mortgage or sale of any part of the inheritance, such a sum as would be sufficient to discharge the debts he should owe at the time of his death; and then reciting the great satisfaction he had of his estates having continued so long in his name and family, and the great desire he had to perpetuate, as far as he could, his name and estate, he devised all his real estate (after his wife's death) to his nephew for life, remainder over to his first and other sons in tail, upon condition of their taking and using his name and arms for ever; and, in the close of his will, gave *all* his goods, chattels, and personal estate to his wife, and made her sole executrix. The question was, whether the wife should take the personal estate exempt and discharged from the payment of debts, or whether the personal estate should not, according to the general rule, be first applied? It was decreed at the Rolls, that the charge should be entirely upon the real estate, and that the wife should have the personal estate to her own use; and that decree was affirmed by Lord Talbot, Chancellor, on the ground, that upon the whole frame of the will, such appeared to be clearly the testator's intent. And his Lordship relied upon the circumstances following, *viz.* that after the gift of the *annuity and legacies* wherewith the testator had charged his real estate, he gave his real estate to his wife for life; and although it did not necessarily follow, that the coupling the annuities and legacies together, shewed he intended both to be payable out of one and the same fund (the personal estate being the proper fund for debts, though no provision had been made by the testator, but the annuities having no fund to answer them, except what was particularly provided for them), yet that must have some weight (*pp*); but then came the power given to the wife, which seemed to him very clearly to manifest this intent that she should take what he had given to her by his will to her own use; for, his intent being to carry down and perpetuate his estate in his name and family, could it be supposed, that after having given his wife the whole power over his personal estate, by making her executrix, he would likewise have given her a power of disposing of so much of the inheritance; and consequently of defeating the devise to his nephew (not of so much as the personal estate should prove deficient,

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(*pp*) [Very little importance can be attached to this argument now. See antea, 805, of this edition, n. (N). —*Ed.*]

but of what should be necessary for the payment of his debts), unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seemed clear to give her this power of disposing of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate, free from all charges whatsoever.

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The reader will no doubt have observed, that in several of the preceding instances, the wife of the testator was the object of his bounty: But although that circumstance might possibly furnish an additional reason in support of those adjudications (because the relative situation of the testator and his legatees, and also of the legatees to each other, are features that ought not to be overlooked in a question upon the intent of a testator, where the influence of natural affections on the actions and inclinations of men are universally acknowledged to have great weight), yet these cases seem to be furnished with circumstances sufficient to take them out of the general rule, without referring to this additional feature, in respect of which they are also distinguishable from the common run of cases.

A condition, *though void*, annexed to a legacy, making it payable out of the land, was held to be sufficient to shew the testator's intent that the personal fund should not be charged with it (A).

Additional ground for pronouncing cases in favor of wife, good law.

Devise to A. he paying particular legacy, exempts personal fund, though A. be heir at law, and condition, as such, void.

(A) The following are instances where the devise of an estate charged with the payment of a particular mortgage debt or legacy has been held to exempt the personal estate from the payment of the particular burthen so exclusively fastened on the real fund.—In *Phipps v. Annesley*, 2 Atk. 57, a testator gave his only daughter the sum of 3000*l.* at her age of 18 or marriage, and declared that the trustees should levy and raise by mortgage or sale of his lands, together with his personal estate, as much as would pay the 3000*l.*, but that it should not be raised till 18 or marriage, out of the before mentioned estate or land, *that it might not be a debt on his personal estate*. Lord Hardwicke held, that the personal estate was exempted, and that the 3000*l.* was a charge on the real estate only. So in *Reade v. Litchfield*, 3 Ves. 475. J. R. devised all his real estate to trustees for a term of 500 years, in trust to raise several sums of money, some of which were debts secured by the testator's bond and covenant, and others in the nature of legacies as provisions for different branches of the testator's family. Lord Rosslyn considered the intention on the whole will to be clear, that the testator did not mean to give these sums as debts, or legacies, but as portions out of the land. He therefore decreed that they should be raised out of the real estate in exoneration of the personal fund.

Particular mortgage, legacy, or debt charged on real estate, an exemption of personal fund.

In *Wood v. Dudley*, 2 Bro. C. C. 316, Lord Dudley, by his will, after devising real estates in manner in his will mentioned, charged all the residue of his real estate, with the payment of all his debts, legacies, and sums of money which in that his will, or in any codicil thereto, he (the testator) should give, bequeath, or direct to be paid, in case his personal estate should not be sufficient to discharge the same, which he did thereby will,

Real estate to pay debts in case of deficiency of personal fund, and charged with

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In the case alluded to (q), A. by his will, amongst other things, devised as follows: "I give and bequeath to my ne-

(q) *Whaley v. Cox*, 2 Eq. Ca. Abr. 549. [See also for a similar point, *Bridgman v. Dove*, ante, 827.—Ed.]

particular portions for younger children, held first liable to the portions.

should be first applied for that purpose, and, subject thereto, he gave all other his manors, &c. to the defendant for life, with remainder to the plaintiff for life, with remainders over; and reciting, that by his marriage settlement he had agreed to settle 5000*l.* as a provision for younger children, he subjected and charged the last mentioned estates to the payment of 5000*l.*, to be paid to the plaintiff at his age of 25 years, with interest from the testator's death, at 4 per cent., and after payment of debts and legacies, he gave the residue of his personal estate to the defendant. The cause came on before Lord Thurlow, C. 11th July, 1787, when his Lordship ordered the sum of 5000*l.* and interest, to be raised by sale or mortgage of the residuary real estates of the testator, and gave proper directions for that purpose; upon which the plaintiff presented his petition of appeal, contending that the said sum was payable in the first place out of the personal estate. On the re-hearing his Lordship said, he thought the case was perfectly clear when it came on before, and though he had listened with great attention, it did not seem that there was any ground for argument; the testator said "I charge the last-mentioned estate with the payment of the said 5000*l.*" This was in its nature and constitution a real charge; the question then was, whether any other parts of the will took up this bounty *de novo*, or directed it to be raised or applied in any other manner, than as directed by the above clause. The main argument rested on the words "legacies and sums of money directed to be paid by the will." Lord Thurlow really did not know how to distinguish these expressions, they meant nothing more than legacies, but would not affect real charges. Comparing therefore all these clauses together, his Lordship thought he had hardly ever met with a clearer case, and he must therefore affirm the decree, which he did accordingly. See 1 Cox. C. C. 438.

Devisee in tail empowered to raise particular legacies, evidence that such were intended to be charged on real estate only.

In *Amesbury v. Brown*, 1 Ves. 481. S. C. infra, 997, the testator gave his real estate generally, after payment of debts and funeral expences, with-
out mentioning legacies; afterwards he bequeathed four legacies to each of his four sisters; and in the same clause added, "all which legacies I mean shall be paid out of my freehold estate in N.," and by a subsequent clause gave a power to the devisee in tail to mortgage and charge the real estate for payment of that money. It was insisted that a legacy given generally is payable out of the personal estate, and though afterwards made a charge on the real, yet as the heir at law is not to be disinherited, the court looks on it that unless the personalty is expressly exempted the legacies shall be payable out of the personal fund. Lord Hardwicke said, this case was not within the common rule, not being a common charge on the real estate in aid of the personal, but an express incumbrance on that estate—an express gift of the legacy out of the real estate, which wherever done, the realty must bear that burthen, and not the personalty, and this was strengthened by the subsequent clause, whereby the testator meant the tenant in tail should have power to do it even without suffering a recovery.

Devise in trust to sell and pay mortgage, and raise another sum which testator gave to his daughters. Personal estate though bequeathed after payment of debts and legacies, exempt on the plain intention.

The next case involved not only the question under discussion, but the whole subject generally. It may not be inappropriately introduced here. W. H. by his will, gave to his wife and H. S. all his manors, &c. as well freehold as copyhold, in the counties of M. and B. or elsewhere, in England, upon trust to sell the same, and apply the money in manner following, viz. that they should in the first place pay off the sum of 3000*l.* due on mortgage of his freehold estate at H. and interest; and in the next place raise the sum of 2000*l.*, which he gave and bequeathed to his two daughters M. and E. equally. And upon further trust, that his wife should take the rents and profits of the residue of his estates left unsold for her separate use, and after her decease he devised all such residue of his estates to his two daughters and their respective heirs and assigns, as tenants in common. And as to all the rest and residue of his personal estate (after payment of all his just debts, legacies, and funeral expences) the said testator gave the

phew B. (who was the testator's heir at law), his heirs and assigns, all my messuages, &c. in the parish of O., in the county

same to his wife absolutely, and appointed her and H. S. guardians and executors. The question was, whether the mortgage debt, and the legacy of 2000*l.* were to be paid out of the personal estate of the testator; or whether the personal estate was exempt. The Master of the Rolls observed, that as to the legacy of 2000*l.* he could not consider it as a general legacy; nor conceive of the personal estate as in any degree charged with it, for that sum was given only as a part of the produce of the real estate. The real estate was devised upon trust to be sold, and an application of the money was directed, in the first place to pay the mortgage of 3000*l.*, and then in the next place the trustees were directed thereout, viz. out of the money produced by the sale, to raise the sum of 2000*l.* which the testator gave to his two daughters—that meant not, as it was contended for the plaintiffs, a sum of 2000*l.* in gross, but a sum of 2000*l.* as part of the produce of the real estate. The general rule was perfectly established, that in order to exonerate the personal estate there must be either express words, or a plain intention. It might have been better if the old rule had been adhered to, namely, that nothing but express words should operate in exoneration of the proper fund. But it was then too late to contend, that the personal estate might not be exonerated by other means. [See also *S. L. Watson v. Brickwood*, 9 Ves. 453.] The intention might be found not merely in the mode in which the personal estate was given, but also in the mode in which the real estate was given, or the application directed to the payment of that debt; for the real estate might be so appropriated to the payment of the debt, as to shew a clear intention that it should not be a burthen upon any other fund, though an intention to exonerate the personal estate was not in any other way expressed. This case came as near to that as possible, viz. a declaration of intention that the real estate should be exclusively burthened with this debt. It was true that a devise to sell for payment of all debts would not exempt the personal estate. But a direction to apply a particular portion of the real estate for the payment of one particular debt afforded a very different inference. Why should the testator direct exclusively a particular debt to be paid out of his real estate? It was not generally from an apprehension that the personal estate might not be sufficient for all the debts; for no precaution was taken, except for this particular debt; and this debt was already a charge on the real estate. Therefore for the security of the debt there was no reason to direct the sale. It was no additional security to the mortgagee. For what purpose, then, could the testator so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt; if he intended that debt to stand just in the same predicament as any other debt; except, only, that it was to be charged upon the real estate; as if already was? Putting that aside, nothing was done by all this particularity of expression, for then the debt stood upon the same footing as all other debts. His Honour then cited the case of *Hale v. Cox*, and after considering its relation to the case before him, concluded by observing, that he gave his opinion not without doubt and hesitation on account of the strong expressions of judges in former cases. It was impossible to say it was so clear that no doubt could be entertained upon it. If that sort of case was required, certainly it did not exist in the case before him, for the direction for payment of all debts and legacies out of the personal estate, raised an ambiguity, to get rid of which he was driven to construction. The decree declared the personal estate to be exempt; and the 3000*l.* having been raised, directed the 2000*l.* to be raised by sale of a sufficient part of the real estate. *Hancox v. Abbey*, 11 Ves. 179.

But it should here be remarked, that although in general cases, if a testator devises his real estate upon trust to sell and raise money to pay off a particular mortgage debt, or a particular legacy, the mortgage or legacy will be a burthen on the real estate exclusively, yet in a case where a testator had expressly charged his real estate with the payment of a particular mortgage debt, and disposed of his personalty to persons who died in his life-time, whereby the bequest of the personalty became lapsed, it was held that the personal estate should again become liable to exonerate the real estate; for it did not follow, that because the legatee

Hancox v. Abbey.

To exonerate personally express words or plain intention must be found in will.

Inference from direction to apply particular portion of estate in payment of particular debt.

Though devise to pay particular debt may be an exemption in favour of legatee, yet will it not be so for next of kin, supposing legacy lapsed.

of G.," and then reciting that he had promised to give to his niece W. 500*l.* (to be paid to her within six months after his

Hale v. Cox.

should take the personality exempt from the mortgage debt, that the next of kin should take it so too; and the legatee being dead, it was the same thing as if the testator had said nothing in his will about his personal estate, in which case a mere gift of the mortgaged premises, subject to the mortgage, would not have exempted the personality. Thus in *Hale v. Cox*, 3 Bro. C. C. 322, the testator having two estates in mortgage, the one called Milstones for 300*l.*, and the other situate at Piper's Row, for a sum not mentioned, by his will directed that the said mortgages, and all other his just debts and funeral expences should be fully paid out of his personal estate; he then gave several legacies, and bequeathed the residue of his personal estate to trustees, in trust, to cause a true inventory to be made thereof, and to protect and preserve the same in the best manner they should be capable of for I.; but if he should happen to die under 21, without lawful issue, then for M. He then gave real estates to the same trustees upon trust for the benefit of I. and M., and gave all other his messuages undisposed of, which included the premises in mortgage, called Milstones, to the same trustees in trust, if they should think proper, to sell and dispose of such his said messuages as should be on mortgage at the time of his decease, and after payment of all principal monies and interest that should be due on any such mortgage, the testator directed his trustees to place out the remaining part of the purchase money at interest, on securities, and to pay the interest to his daughter C. I. for life, with remainders for the benefit of her children; he then gave his trustees discretionary powers with respect to the mortgaged premises if they should think proper, to continue them in mortgage to the then mortgagees or to borrow money of other persons on mortgage thereof, the rents and profits thereof, in that case (after payment of interest, &c.) to be to the same uses, with an ultimate remainder to his own right heirs, and appointed his trustees executors. I. and M. both died in the testator's life-time, and the executors of the mortgagee filed the present bill, praying, among other things, an account of the personal estate of the testator; and if it should appear insufficient to pay what should be found due in respect of the mortgage, that the deficiency might be raised by sale of the mortgaged premises, or other parts of the testator's real estates. The case being argued, Lord Thurlow observed, that the testator appeared very anxious to give no real estate till after the payment of the debts. The will stated, that if it were more convenient for the family, the mortgaged estate should not be sold, but other money borrowed upon it, to pay the mortgaged debt. Was it possible, then, to throw the debt upon the personal estate? Could it be construed that the testator intended it to be sold, and that so much as exceeded the 300*l.* should go to the legatee; that the 300*l.* mortgage money should be paid by the personal estate, and the 300*l.* which continued real, descend to the heir at law? It would be too much to attribute this intention to the testator. Upon the whole of the will, it seemed, that he meant the personal estate should pay the other mortgage, but as to this, that it should be exonerated for the benefit of the legatees. But although the intent was that the legatee should take the personal estate, exempt from the mortgage debt, it did not follow that the next of kin should take it so too. The legatees being dead, it was the same thing as if he had said nothing in his will about his personal estate. "It must devolve," added Lord Thurlow, "in the ordinary way, as if it stood without any expression of a desire to exempt the personal estate, and then the personal estate must be applied." *Hale v. Cox*, 3 Bro. C. C. 322.

Same law.

In another case also, the benefit of the exemption of the personal estate was confined to the legatee. The will recited that the testator, since his marriage, had purchased the manor of Ince, but to enable him to do so had mortgaged the same, and other premises for the purchase money. He then devised all his estate and interest in the said manor of Ince, subject to the annuities, bequests, and directions, as by his said will, or any codicil he might give, to his wife for life, and after her death to such uses as she should appoint, with remainders over in default of appointment. The testator bequeathed several legacies and annuities, and gave the residue of his personal estate to his wife upon trust to discharge all his debts, for which

Exemption by implication.

decease), went on and said, "and my will is, that my said estate at O. shall stand charged with the said sum of 500*l.* to be paid

at the time of his decease, he should not have given real securities, and all such bequests and annuities (not including those before mentioned) as he should therein, or by codicil give, and with which he should not, expressly charge his estate at Ince. The testator's wife died in his life-time. The will was not re-published, and his second wife took out letters of administration with the will annexed, whereby she became entitled to the personal estate, against whom, and her second husband (Ward) the heir at law filed his bill, charging that the mortgage was not the old burthen on the estate when the testator purchased; but that he mortgaged the same in manner aforesaid, and personally borrowed 30,000*l.* and pledged the estate as a collateral security for re-payment; and did not purchase the said estate, or any part thereof, subject to such debt; and praying that the real estate might be exonerated. The Master of the Rolls said, that with respect to the question to be determined, he had no difficulty in declaring, that it was impossible upon the will to raise any presumption, that the testator meant to exempt the personal estate in favour of this defendant from those debts, which if there were no exemption would be a charge upon it. Nothing was more clear upon principle than that if there were a gift in favour of a particular legatee, and he died, no benefit that legatee could have claimed, if he had survived, could be set up against the persons to whom the estate would come, subject to the disposition in favour of that legatee if he had lived. If, for instance, an estate had been given to A. and the personal estate to B. exempt from debts, that exemption was to be considered as intended only for the benefit of B., that he should not pay those debts to which he would be liable, if no such provision had been made, and was not a general exemption of the personal estate. Where an exemption was created for the benefit of a particular person, not for the benefit of the estate generally, if that person could not take it, the benefit never arose. The testator, in the case before his Honour, had never expressly charged the personal estate with debts. He gave the estate he had purchased charged with annuities, and such other annuities, bequests, and directions, as he might afterwards give to his wife for life, with a power of appointment; he afterwards gave the personal estate, not in words of exemption, but with words of charge that were upon fair inference equivalent to words of exemption from debts, for which he should at the time of his decease, have given real securities. The first Mrs. W. would have taken the personal estate discharged from those debts. The clear effect in point of law was a gift to her of the personal estate with the benefit of this exemption, but there was no inference, upon which any one else could claim that benefit. Upon the true construction of this will, the discharge of the personal estate could operate only in favour of the first wife. "Declare, therefore," the Master of the Rolls added, "that the bequest of the residue of the personal estate to the testator's wife became lapsed by her death in his life; direct an account of the debts, and how they are secured, and of the personal estate; and reserve the consideration whether the plaintiff is entitled to have the estate descended to him, exonerated from the money due by mortgage to Mrs. Trevor, at the date of the indentures of 1771." *Waring v. Ward*, 5 Ves. 670. The case afterwards came on for further directions on the equity reserved, and is reported, 7 Ves. 332.

Waring v. Ward.

All benefit attached to a legacy, lapses with it, in case of legatee's death in testator's life-time.

Two last cases questioned; but on doubtful authority. Semb.

Notwithstanding the express authority of the two latter decisions, the principle of them seems not to have given entire satisfaction to the profession. This I infer from Mr. Belt's note (1) to *Hale v. Cor*, ubi supra, where reference is made to a manuscript case in these words: "The like was also determined in *Noel v. Lord Henley* and others, per Ch. Baron Richards, in the Court of Exchequer, 10th May, 1819, which case will soon be published in Mr. Daniel's Exch. Rep. 1 vol. It will be seen that the devise of the real estate, there, seemed to afford a most strong argument that it was to bear the burthen of the charges at all events, and it was ably contended by Mr. Lovat, that the fact of lapse, and all matters relative to the personality, had nothing to do with the question. The parties, therefore, appealed to the House of Lords, which matter is still pending." See 3 Bro. C. C. 322, Belt's edit. n. (1). Mr. Daniel's report of this case of *Noel v. Henley* has not yet appeared. Mr. Price however has reported the case fully. See 7 Price, 241. But no allusion is made to the above-mentioned

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at the time aforesaid ; and I have devised my said estate to my nephew B. his heirs and assigns, upon condition he pay the said sum of 500*l.* at the time aforesaid ;” and one question was, whether this 500*l.* was charged upon the real or personal estate in the first place ? And it was decided by Sir Joseph Jekyll, that the 500*l.* ought to be taken as a charge upon the land at O. in the first place ; because the testator did not only charge his lands at O. with this 500*l.*, as he did with several other legacies and annuities, but he distinguished this 500*l.* by devising these lands to B. in fee, on condition that he paid the 500*l.*, and though this was a void condition, as the devisee was heir at law, and none but the heir could take advantage of the condition, upon which reason also the devise was void, the lands descending to B. as heir at law, yet this particularity in the will served to shew the intention of the testator, that these lands at O. should be applied to the payment of the 500*l.* in the first place, and not the personal estate.

Devise to A. he paying debts—in default, creditors to enter, personal estate not exempt.

But where the condition, annexed to the devise, was not a condition to avoid the whole estate charged with the debts in default of payment, but was to be taken advantage of by an entry given to the creditors and legatees, it was determined that the personal estate should not thereby be exempted.

Thus, where (r) a man made his will, and I. S. his executor, and gave him a legacy of 20*l.* and devised all his lands to I. N. and his heirs, upon condition that he paid his debts and legacies ; and if the debts were not paid within two months, then he devised that the creditors and legatees might

(r) *Gower v. Mead*, Pre. Ch. 2. S. C. 2 Vern. 120, [antea, 828.—Ed.]

argument of Mr. Lovat ; nor is there any note or other intimation that the parties were dissatisfied with the Chief Baron's decree and intended appealing to the House of Lords. Mr. Belt was in the cause, and obtained that information, it is presumed, from private sources. The case of *Noel v. Henley* fully confirms the doctrine settled by the two preceding cases of *Hale v. Cox* and *Ward v. Waring*, see *infra*, 903, 3d ca. in 2d sec. of note there.

Devise subject to mortgage no exemption ; contra, if estate be charged with, or devised in trust to pay mortgage.

It is merely necessary to add, that there appears to be a distinction in cases of exoneration between a devise upon trust to sell and pay off a mortgage, or a devise expressly charging the real estates with the mortgages thereon, and a devise *subject* to a mortgage merely. In which latter case there is no ground to presume an intention to exempt the personal fund by throwing the burthen exclusively on the real estate. See *Hale v. Cox*, *ubi supra*, and *postea*, 910. But the words “ *subject* to a mortgage,” would, it is presumed, have a different effect in a conveyance or settlement. See *postea*, 939 and 945, and these observations may be made without interfering with what was said by the Lord Chief Baron in 7 Price 264, or by Lord Eldon, in 1 Meriv. 220, or by Lord Manners, in 1 Ball & Rea. 316, viz. that neither a mere charge, nor a direction to sell, nor the creation of a term, for payment of debts, will, of itself, be sufficient to discharge the personal estate, as the primary fund.

enter; and the question was, whether in this case the personal estate should be first applied in case of the real estate? It was contended, that the personal estate should not be liable in this case; and it was said, that it was the same as if the testator had devised lands to I. N., upon condition to pay 20*l.* to A. and 20*l.* to B., and in that case, without question, the devisee of the lands could have no advantage of the personal estate. But it was held by the Lords Commissioners of the Great Seal (viz. Maynard, Keck, and Rawlinson), that the personal estate was first liable in this case; but they went upon different grounds. Lord Commissioner Maynard said, that if a man devised his real estate to another, upon condition to pay his debts, and did not dispose of his personal estate, that should be first applied in case of the real estate; and here the condition annexed to the devise, was not a condition to avoid the whole estate, but only to give an entry to the creditors and legatees. Keck rested upon the ground, that an executor did not take on his own account any more than an administrator; and Rawlinson said, that there was a diversity betwixt a *hares factus*, and devisee of particular lands; for a devisee of particular lands should not have the benefit of the personal estate, but *hares factus* of the whole estate should.

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General devisee entitled to benefit of personal estate. Contra of particular devisee.

See ante, 815.

Intention to exempt personal fund not provable, dehors the will.

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Rule now independent of feudal principles.

Testator directs sale, and gives money after payment of

There is also a class of cases, to which this rule, as to the exoneration of the real estate, does not apply, but which are frequently discussed as falling under its influence, for want of adverting to the causes on which the rule is primarily founded; for if these causes are not to be found in the case, it is out of both the spirit and the letter of the rule.

It has been observed, that this rule, as to the application of the personal estate to exonerate the real, in cases where the real estate is subject to debts, or charged therewith, or, where a trust is created for that purpose, was built on feudal notions, to support the tenure, and preserve the feud entire. Then it can never apply, where the feud is to be completely charged; as if the real estate be to be sold out and out, and turned into personalty; for, in such case, there is no heir either *factus* or *natus* to be favoured; the sole question lies between the owners of the personalty, which of them shall bear the burden, and then it is fair to leave it where the testator has placed it.

Therefore, if a testator directs his lands to be sold and converted into money (s), and disposes of all the money to arise

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debts, as money, personal estate not exonerated.

thereby, after the payment of his debts thereout, as money, and gives his personal estate to his executor; this furnishes a strong ground to presume, he intended that his land should not be exonerated by his personal estate; because, in such case, it is plain that the testator means to reduce his whole estate into one species of property, to be disposed of as he directs; and then the direction, that part of the money to arise by the sale of the land shall be applied to the payment of debts, is in truth only an appropriation of a particular part of that general fund to a given purpose. And in such case, the principle of equity, which induces the Court to favour the *hæres natus*, or the *hæres factus*, does not attach; because the testator leaves no real estate to be preserved for either; on the contrary, the case falls under another principle, of as operative a nature as that, to which we have lastly alluded, namely, the principle, that whatever is directed to be done, ought to be considered as done, under which rule the land so appropriated ought to be considered as money.

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Devise in trust to sell and pay debts, and residue to A. Bequest of goods as heir-looms, and residue of personal estate to B. This residue a specific bequest, and exempt (B).

The case of *Wainwright v. Bendlows* (t), decided by that great master of equity, Lord Cowper, falls under this distinction. There, one by will devised all his fee-farm rents, in the county of N., to trustees and their heirs, in trust, to sell the same for payment of his debts, and the residue of the money arising thereby, he devised to his two sons equally to be divided between them; then he gave several of his goods to go along with his estate as heir-looms and devised all the residue of his stock, goods, and chattels, to his sister, whom he made his executrix (u). The question was, whether the personal estate

(t) *Wainwright v. Bendlows*, Pre. Ch. 451. S. C. 2 Vern. 718. [Gilb. 125. Amb. 518.]—Note, this is a specific devise of residue. [See antea, 867 & 870, for cases on specific bequests of residues. See also *Hartley v.*

Hurle, 5 Ves. 540, and *infra*, p. 903, in *notis.*—Ed.]

(u) Note, in *Vernon*, it is said to be devised to his brother John, his brother Philip, and his brother-in-law, *Wainwright*.

Residue not specifically bequeathed, if it means surplus after payment of debts.

(B) The case of *Bowman v. Reeve*, Pre. Ch. 578, affords an instance by way of distinction, where the residue was held to mean a surplus after payment of debts and legacies. At least so it may be inferred from the observations of the Chancellor, who said that the residuary legatees had nothing to their own use but the residue after the debts and legacies paid, and this residuum was chargeable with the debts; the creditors, it was true, might take what part they thought fit in satisfaction of their debts, and the enumerating of particulars in the devise of the residuum made it no more a specific devise than as if the testator had only said, in general, all the rest and residue of his goods and chattels, or such like words. The residuum was therefore held liable to the payment of debts, and although the creditors thought fit to fix on other parts of their debtors estates, and thereby to deprive the specific legatees of what was intended them, yet in consideration that such was contrary to the testator's intention, his Lordship declared a recompence to the specific legatees out of the residuary fund,

should be subjected, in the first place, to the payment of debts in ease and exoneration of the real estate devised for that purpose? It was contended that it should, on the ground that such was the constant course of the court. But it was argued on the other side, that here was an express fund devised for the payment of his debts; and a distinction was taken between a bare charge on the testator's real estate for payment of his debts, as by a devise of a term thereof for that purpose, and this case; for that he had given his lands out and out, and had parted with them for ever, so that he never intended any of them should remain in his family; that these lands were therefore to be looked upon as money, and consequently in a Court of Equity, were part of the testator's personal estate, and that the residue of his goods, chattels, and stock, must be intended the residue of those, which were not specifically devised as heir-looms (x), and not the residue, after debts paid. Lord Cowper was clearly of this opinion, and decreed, that the personal estate was not in this case liable to the debts (c).

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So, in a late case (y), where a testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts, *the residue to be added to his personal estate*; the only question was, whether, under this devise, the real estate should exonerate the personal estate? It was contended that it should not. That to produce such effect, there must be a destination, as to the estate to be sold for the mere purpose of the payment of debts. That here there was only a direction *in transitu*, and the words did not necessarily imply, that the personalty was to be exempted. But Sir Lloyd Kenyon, then Master of the Rolls, held, that the

Devise to sell, "and when sold," to pay mortgages and other debts, residue to be added to personal estate. Produce of real estate to be first applied (D).

[886]

(x) *N. B.* This last distinction of Lord Cowper, is not approved of by Lord Hardwicke, Amb. 38. Rejected, *ibid.* 39, not mentioned in Amb.

Sed vide *Adams v. Meyrick*, *supra*, 859.

(y) *Webb v. Jones*, 2 Bro. C. C. 60. *S. L. Donne v. Lewis*, *ibid.* 257.

(C) Lord Hardwicke, in quoting this case as reported in Vernon and Precedents in Chancery, said, there was some difference in the two books of Lord Cowper's reasons; and Lord Hardwicke must own, that he was not satisfied with Lord Cowper's reasoning as to the bequest of the residue of the personalty, as reported in Vernon, for it was very dangerous. See Amb. 38. This explains the author's unintelligible note (x).

(D) Where lands are directed to be sold, and after payment of debts the surplus monies to go with the personal estate, so as to make them one joint fund, there is no reason for distinguishing between the application of the funds, for the person entitled to the residue cannot fail to have the residue of that very fund which the testator has created for the payment of his debts. See *antea*, p. 846. *Tweedale v. Coventry*, 1 Bro. C. C. 260. and *Harley v. Hurle*, 5 Ves. 546, 547, et vide *antea*, 846.

Rule inapplicable where funds are amalgamated.

intention to exonerate the personal estate was clear; he said, he laid no great stress upon words, but he must lay some upon the words, "when sold, the money to be applied to the payment of mortgages, and all other debts;" and his Honour farther observed, that the testator had directed the residue to be added to the personal estate; but according to the construction contended for, that could not be done: he declared, that the money arising from the sale was to be applied to the payment of debts, in exoneration of the personal estate.

Devise in trust to pay debts, and invest residue.—After legacies, gift to wife (who is executrix) of goods, &c. Personality exempt from debts and legacies, but not from funeral expences.

[887]

Executor directed to pay all debts. Devise of manor, &c. subject to incumbrances to A. Personal estate must exonerate manor of mortgage (B).

[888]

So, where C. devised a manor to trustees in trust to sell (z), and directed the monies, to be raised thereby, to be paid in discharge of all his debts, and after payment thereof, in the first place, to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to his nephew; and after several specific and pecuniary legacies, gave to his wife all his goods and chattels, and appointed her executrix: it was held, that the personality was exempted from the debts and legacies, but was subject to the funeral expences; and it was decreed accordingly.

Although the mortgagor devise the estate subject to the incumbrances, which are upon it at the time of his decease, yet if, from other circumstances, there be ground to infer, that the testator did not thereby intend to exempt the personal estate from exonerating the real estate, that fund will, notwithstanding, be first liable to the charge.

Thus (a), where one seised in fee of a manor and lands near G., in S., that were in mortgage, and likewise seised in fee of other lands, begun his will by "directing that his executor "should pay and discharge ALL his just debts, and that he "should raise sufficient to pay the same, and then devised his "manor, &c. at G., to I. S. at the age of twenty-one or marriage, subject nevertheless to the incumbrances, that were, "or should be, upon it at the time of his decease, and in the "mean time, and until I. S. should arrive at her said age or "marriage, the rents, issues, and profits, to be paid by his "executor, into the hands of her father and mother, which

(z) *Holliday v. Bowman*, cited 1 Bro. C. C. 145.

(a) *Searle v. St. Eloy*, 2 P. Wms.

386, et vide *Astley v. Earl of Tankerville*, 3 Bro. C. C. 548. [S. C. 9 Mod. 398.—Ed.]

(E) So, if a testator expressly exempts his personality from the payment of mortgages, and devises the mortgaged lands subject to incumbrances, the lands descended shall be liable to pay off the mortgage money in favour of the devisee. *Barnewell v. Lord Cawdor*, 3 Madd. Rep. 453, cited also postea, 911, in notis.

"ever should be living at the time of the testator's decease, "for the plaintiff's sole benefit and advantage, and then devised "to his brother L. C., and his heirs, the reversion of the manor "of W., (after the death of M. F.) subject nevertheless to the "payment of such of his debts as should remain unpaid. "And all the rest of his real and personal estate, not therein "before specifically disposed of, he devised to J. S. E., his "heirs and assigns, in trust to sell and dispose of the same, as "soon as conveniently might be after his decease, and thereout "to pay his debts and general legacies; and in case there should "be any deficiency; and that any of his debts and legacies "should remain unpaid, then he charged the same on the re- "version and inheritance of the manor of W., and thereby "directed the said L. C., and his heirs, to pay off the same "within six months after the death of M. T., and he made "the said J. S. E. sole executor." At the time of the testator's death, the manor, &c. at G. in S., remained in mortgage to one H. for 500*l.* and the question on a bill filed in Chancery, was, whether this mortgage debt of 500*l.* should be discharged by the executors and trustees of the testator, or should be left upon the estate devised; and his Honour decreed, that *all* the debts and general legacies of the testator, were by his will to be paid out of his personal estate, and the real estates devised to the defendants I. S., E., and C., and that the mortgage of H., on the estate devised to I. S., was to be taken as one of those debts. And this decree was affirmed on appeal to Lord King.

[889]

The circumstance from whence the court seemed to have concluded in the above case, that the testator had no intention to exempt his personal estate from exonerating the real, by devising it, subject to the incumbrances thereupon, appears to have been, that the devise of the other lands was to pay *all* his debts; which word *all* is omitted by Peere Williams in his report of the case, although it appears on the record of the proceedings. Accordingly, Lord Thurlow, in the case of the *Duke of An- castle v. Mayer* (b), observes, "that the case of *Searle v. St. Eloy*, went upon the idea of the charge upon the real estate being the *debt* of the testator." But his Lordship observes, "that if that case were recent, and had not been followed, he should have thought upon the face of it, it was very open to argument."

Observations
on last case.

[890]

(b) 1 Bro. C. C. 461, [fully ac- 899, and stated at large, postea,
quiesced in by Lord Alvanley, postea, 923.—Ed.]

Debt contracted by testator, and debt contracted by his ancestor, distinguished as to trust for payment of debts.

And in the case of the *Duke of Ancaster v. Mayer*, Lord Thurlow distinguished the case of a *charge subsisting*, from that of a debt contracted, under such circumstances of a devise to pay debts; holding, that where there was a charge inherent in the estate, and prior to the deviser's title, neither his personal nor real estate, devised to pay such testator's debts, should be thereby charged with such incumbrance (F).

Two cases have lately occurred upon this subject, in which his Honour, the present Master of the Rolls, has fully considered the authorities upon the subject, and drawn such conclusions from them, as place the principle in a clear point of view.

[891]

Real estate devised to trustees (not executors) for payment of debts and funeral.—Residue of personal estate bequeathed to A. in trust, as testatrix shall appoint, in default to A. who is made executor.—He takes residue beneficially, exempt from debts.

In the case of *Burton v. Knowlton (c)*, A. devised all her freehold, copyhold, and leasehold, messuages, &c. and all her real estate to two trustees, upon trust after her death, with all convenient speed to sell, &c. all, or any part of, her real estate; and, with the money arising from the sale, to pay off and discharge all the mortgages and incumbrances in any wise affecting the real estate, and also all other her just debts and *funeral expences*; and to lay out the surplus in stock, and to pay and apply the clear rents and profits of her real estate, or so much as should not be sold, and the clear annual income and produce of the money arising from the sale, after payment of the debts, for the benefit of her friend B. for life, and after his decease to convey, apply, and dispose, of all such parts of her real estate, and the produce thereof, not sold or applied, to the heirs or heir at law of her cousin C. The testatrix then gave her family

(c) 5 Ves. 107, [et vide 18 Ves. 133, 139.—Ed.]

(F) Lord Thurlow's words explain themselves much better without than with the learned author's commentary; but it is questionable whether the distinction at this day be entitled to much attention. The words were the following:—"the difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge, but in the present case, the debt of the father falls upon the estate in two ways, partly as being a charge, and partly as being a debt upon the personal estate."

What weight attaches to circumstance, that trustee of real estate is executor.

It is also observable, that in the case of the *Duke of Ancaster v. Mayer*, as in many of the preceding cases, very considerable stress was laid on the circumstance of the persons who were appointed executors, being the same to whom the real estate had been before devised as trustees. In other cases this circumstance is considered as less material, but the degree of weight to which it is entitled depends upon the whole of the will taken together; and, if a distinction is to be discovered, from the beginning to the end of the will, between what they are called upon to do in the character of executors, and what as trustees; and if the testator directs them, as trustees, to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to, in determining which is the manifest general intention of the testator—per Lord Eldon in *Boottle v. Blundell*, 1 Meriv. 227.

pictures, &c. to her heir at law. She gave several legacies to several persons, and 50*l.* to each of her two trustees, over and above a reasonable recompence for their trouble, which she directed them to retain out of the trust premises : then, after giving several other legacies, she gave 200*l.* to be paid by the said trustees, after the decease of B., to such person and persons, and in such manner and form as he should, by any deed or writing under his hand, appoint. All the rest and residue of her personal estate and effects whatsoever, not before specifically disposed of, she gave and bequeathed to the said B., his executors and administrators, upon trust to pay, apply, and dispose of the same, to such person and persons, and in such shares as she should, by any writing to be executed by her, appoint ; and for default of appointment, she gave the residue to the said B. for his own use and benefit, and she then appointed him executor.

Burton v. Knowlton.

[892]

The testatrix died without having made any appointment. The only question was, whether the estate not specifically disposed of, or the real estate, should be first applied in discharging the debts.

Et per Master of the Rolls. This is one of those cases that come so often before the court, and which have given rise to such difference of opinion upon the bench, that it cannot be wondered that I have taken so much time, both in this and in the case of *Brummel v. Prothero* (cc), the next cause that stands for judgment, and upon which I confess, if the consideration of the one did not involve that of the other, I should not have taken so much time ; however, upon full consideration of the will, and fully subscribing to the principles that swayed the court in *The Duke of Ancaster v. Mayer* (d), I am perfectly satisfied this testatrix did intend to give her personal estate to B., exempted from the payment of debts. The cases are very numerous, and great judges have differed upon them : some have thought the words sufficient to exempt the personal estate ; others have thought they did not afford that demonstration. I shall not go into the circumstances of the cases. There are certainly many ingredients in this that seem to have been relied upon by judges, who have thought the personal estate not exempt. The circumstance that the trustees are not the executors affords a strong inference as to the real intention, and is always favourable to the exemption of the personal

Judgment.

[893]

Trustees not being executors, evidence favourable to exemption of personal estate.

(cc) [postea, 899.—Ed.]

(d) *Supra*, 889.

*Burton v.
Knowlton.*

[894]

estate; and I desire to have it understood, that though the words "*funeral expences*," comprised in this trust, occur in some of the cases, and are held not to have any considerable weight, yet that is where the trust fund is given to the executors, to whom the personal estate is afterwards given; and I cannot but think, that where the trust fund is given, with such general words to trustees, who are not the executors, upon whom the *funeral expences* would naturally fall, it does afford a considerable argument, that the testatrix did not mean the personal estate to be the fund for all those charges that naturally fall upon it. The subsequent words of the residuary clause convince me, that she did not mean to give [the residue to her executor] as executor, but as a specific legacy, and exempt from the debts; for so far from being given to him as executor, and his being entitled to it as such, it is given to him upon trust, to dispose of it according to her appointment, and for default of appointment for his own use, and then she makes him executor.

There must be something tantamount to express words to exempt personal fund from debts.

[895]

Residue in this will means residue not specifically given.

I need not state the principles which have been so often commented upon, in *The Duke of Ancaster v. Mayer*; that unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts, it shall be taken subject to them. Great stress was laid in the argument on the word "residue," and it was said, in *The Duke of Ancaster v. Mayer* (e), the court laid great stress upon that word. I think, in that case, a great deal of argument did arise from that word, as there applied; but I cannot read this will without giving to the words, "rest and residue," a meaning totally distinct from residue, after payment of debts; for these words, coupled with the words "not specifically bequeathed," mean only such parts of the personal estate as are not specifically given, which alludes to what she had before given to the heir, or to the leasehold estates given to the trustees. There are so many shades of difference between *The Duke of Ancaster v. Mayer* (f) and this case, that a thousand arguments might arise in that, that do not arise in this; and when I read *Walker v. Jackson* (g) before Lord Hardwicke, who certainly differed from Lord Talbot; and when I read Lord Thurlow's judgment in *The Duke of Ancaster v. Mayer*, I cannot think the word "residue" bears, upon this case, as it did on that, for there the trustees were likewise

(e) *Supra*, 889.

(f) *Ibid*.

(g) *Vide supra*, 875.

executors. The testator gave all his personal estate to the person entitled to the rents and profits of his real estate: it is not given as a residue, as here; but all his personal estate so given, he himself afterwards calls by the name of residue; and then, upon which Lord Thurlow very justly laid the greatest stress, and which, I think, put it out of the power of the court to exempt the personal estate, he nominates the same persons executors of his will, who were trustees for the payment of the debts; and directs them to discharge his funeral charges, and all his debts and legacies, as soon as they should become due and payable, as counsel should advise, and to satisfy themselves out of his personal estate, or the trust fund; all disbursements, expences, and charges, they should be put to in proving, or in the execution of the will. Lord Thurlow thought it too much to say upon such a gift, the trustees holding both funds, and having an option to pay out of both promiscuously, that the personal estate was intended to be exempt. Great doubts were entertained upon that case at the time, but I most heartily subscribe to it. But Lord Thurlow there says, what has imposed a most grievous task upon the court; that it is too late to say express words are necessary. There are many cases determined in favour of the personal estate, which I should have had great difficulty to acquiesce in; *Adams v. Meyrick* (k) is a very weak case. In *Stapleton v. Colville* (i), the circumstance laid hold of by Lord Talbot does not satisfy my mind, nor does it seem to have satisfied Lord Hardwicke and Lord Thurlow, viz. the mere circumstance of the executor having a power to raise so much out of the term as would be sufficient for the debts. I have felt great anxiety and difficulty for fear of drawing so nice a line, that judges can hardly tell how to guide themselves in determinations of this sort. I have looked very carefully at *Walker v. Jackson* (k), and it must be remembered that Lord Hardwicke, who determined that case, thought the words not sufficient in *Lord Inchiquin v. O'Brien* (l): in the former he considered all the cases. In applying that case to this I am perfectly satisfied, that if he was right in the consequence he drew in that case, I am warranted in that which I have drawn in this. It was upon the

Burton v. Knowlton.

[896]

Too late to say express words are necessary to exempt personal fund (a).

[897]

(k) *Supra*, 859.

(i) *Supra*, 875.

(k) *Supra*, 873.

(l) *Supra*, 856.

(G) For similar observations, see 9 Ves. 453, and 11 Ves. 186.

*Burton v.
Kneelson.*

[898]

*Gaskill v.
Hough. Real
estate particu-
larly appro-
priated to debts,
personal estate
exempt (H).*

[899]

codicil that Lord Hardwicke's opinion turned, as affording a presumption for the exemption of the personal estate; but if the report is right, he did not rest merely upon its being by way of codicil, but thought, that if it had been in the will, it would be a strong case for the exemption of the personal estate; so I think, for the codicil is only part of the will, and it is to be taken altogether. This testatrix having given this fund in the largest words to pay all mortgages and incumbrances, and all other debts, and even her *funeral expences*, to persons who are not then naturally to pay them, gives the rest and residue, not before specifically bequeathed to the person whom she makes executor; but not as executor, for she had an intention of appointing it, and then in default of appointment, she gives it to him for his own use. Compare these words with *Walker v. Jackson*. I think I am perfectly warranted in saying, there is demonstration plain that she did not mean to give it to him as executor, but specifically for his own use and benefit, and exempt from the payment of debts. I have had great difficulty, and am much afraid of breaking in upon established rules, which I never desire to do. There is a case which is not reported, and was suggested by me, and deserves some account, to shew that the principles of it are not broken in upon: it is *Gaskill v. Hough*, Feb. 1774, in which I was counsel. The court thought the personal estate exempted. That depended upon very different principles; it was neither a charge for debts, nor a devise for payment of debts, for I am not one of those judges who think there is much difference, whether it is the one or the other, unless there is demonstration that the personal estate is intended to be exempted: that case was not a charge upon the real estate, but an express direction and declaration that the debts, funeral expences, and charges of probate, should be paid out of the real estate, and the testator then gave his personal estate to his wife, except a leasehold estate in Stockport, which he gave to another: the heir was an infant. The court has never gone the length of saying, that in such a case the real estate is not particularly appropriated; and from that very appropriation the

(H) The words, according to the learned judge who decided this and the next case, were, "I will that all my just debts shall be paid out of my real estate." See postea, 902. Vide also *Murch v. Fowke*, antea, 845, but in that case there were words of exclusion. The general rule is introduced antea, 787, of this edition, n. (S).

personal estate is exempt. Fully acquiescing in *The Duke of Lancaster v. Mayer*, I am perfectly satisfied that I am warranted in holding, that this personal estate is given to B. exempt from the payment of debts.

In *Bruamel v. Prothero* (m) A. devised all his manors, &c. with their and every of their appurtenances, unto B., and to his heirs in trust; in the first place to pay all his just debts, and also to and for the use, intent, and purpose, that his mother and her assigns should, after his decease, receive, out of all and every his manors, &c. an annuity or rent-charge of 120*l.*; and to and for this further use, intent, and purpose, that his four sisters of the half blood then living, and their assigns, should, from and immediately after the decease of the survivor of him and his mother, during their respective natural lives, have, receive, and take, out of all and every the said manors, &c. an annuity or rent-charge of 200*l.* in equal shares and proportions, with powers of distress and entry; and as, to, for, and concerning all and every the said manors, &c. from and immediately after his decease, charged and chargeable as aforesaid, to the use of his brother D. and his issue in strict settlement, remainder to the use of his half brothers E. and F., and their issue, successively, in the same manner, remainder to the use of his said sisters, and their heirs, as tenants in common; and he directed his said brothers of the half blood, and their issue, when in possession, to take the name of A.; lastly, he gave and bequeathed unto his said brother D. all his monies, goods, chattels, rights, credits, personal estate and effects, whatsoever and wheresoever, and he appointed his said brother sole executor.

Devise of real estate to pay debts, and afterwards annuity to C. Bequest of personality to D. who is appointed executor. Personal estate first liable.

[900]

The bill was filed by bond creditors, and the question was, whether the real or the personal estate should be first applied in the discharge of the debts. [901]

Master of the Rolls. I shall not determine it now; I will look at the will very carefully; but I will state the principles that will guide my determination. First, I will not look out of the will as to the state of his affairs; I shall not be guided by the consideration, whether he could or could not, under certain circumstances, have intended what might or might not have been inferred from the same will under other circumstances. Secondly, as to the irresistible inference, I do not know what is meant by that: I admit it must be such an inference, as

Court proceeds on inference, not presumption; consequently collateral evidence inadmissible.

leaves no doubt upon the mind of the person who is to decide upon it⁽¹⁾: it must be irresistible to my mind: it need not be such, that no man alive can doubt it: but it must not be a case of presumption; for then we shall get into the miserable way of explaining it by evidence: it is not like the case between the executor and the next of kin, where the residue is not disposed of, which, I say, is only whether the testator did or did not, upon the whole, intend, at the time, that the executor should take it: that may be explained by evidence; this cannot; but must stand upon the will. There are, I am sure, cases upon these words, "I will that all my just debts shall be paid out of my real estate;" that, I take it, was determined to lay it upon the real estate only. There was a case of *Gaskill v. Hough* (nn), in the Exchequer, in which the words were something like these. This is a case which cannot very unfrequently have happened. I must be perfectly satisfied, before I decide that the personal estate is exempted. In *The Duke of Ancaster v. Mayer* the Lords Commissioners were satisfied; Lord Thurlow was not; and he said, nothing but absolute satisfaction should induce him to exempt the personal estate. Irresistible inference is not necessary even in the case of an heir at law. In the known case of a devise to the heir, after the death of the wife, the inference is not irresistible; if it is to a stranger, there is no inference.

[902]
 "I will that debts be paid out of real estate," an exemption of personality. Semb.

Devise to trustees for debts, and general bequest of personality to executor, never held an exemption of personal fund (oo).

[903]

On a subsequent day his Honour said, my determination in this case is directly the reverse of the last; for I am clearly of opinion it is not sufficient to exempt the personal estate from the debts. I have looked very attentively at the will, that the party should not think it a hard determination, because different from the last. There is a wide difference between the two cases. This is stripped of every circumstance, except that of a devise to a trustee for the payment of debts, and a general bequest of the personal estate to the executor. There is no one case since *French v. Chichester* (n), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has been over and over again

(nn) [S. C. cited antea, p. 898, in the text.—Ed.]

(oo) See antea, 824, of this edition.—Ed.]

(n) Supra, 833.

(1) In *Hartley v. Hurle*, the Master of the Rolls made the same observation. See 5 Ves. 546.

decided, that such words are not sufficient to raise such a demonstration as Lord Thurlow says is necessary (K).

(K) The following are the subsequent decisions on the points previously discussed in this chapter. They are arranged according to the simple division of the learned author, namely, 1st, Those which furnish an inference, that the owner of both funds did not mean to exempt the personal estate, and 2d, those, where from the construction of the whole will it appears he had such intention.

I. Under the first class may be placed the case of *Tait v. Northwick*, 4 Ves. 816. The testator in this case devised his real estate to four trustees upon trust by absolute sale or mortgage thereof, or of any part thereof, or by sale of timber thereon, or by such other ways and means as to them the said trustees should seem proper, to raise such sum of money as should be requisite to pay the several sums of money borrowed of Sir W. Pulteney, and all such other debts as the testator should at the time of his death owe to any person or persons whomsoever by mortgage, bond, or other specialty, or by simple contract, or otherwise howsoever, and all interest thereof. And after disposing of the surplus of his real estates after payment of his debts, and giving some legacies, the testator bequeathed all the rest and residue of his "personal estate whatsoever and wheresoever, and of whatsoever nature or kind soever" to his two sisters equally, for their own use absolutely; and he appointed two of the said trustees executors. The cause coming on for further directions, a question arose, whether under this will the testator's personal estate was exempted from the payment of his debts? For the residuary legatees it was contended, that the will shewed an evident intention in their favour, particularly from the testator's very anxious directions as to the debts, before he proceeded to the disposition of his personal estate; and it was asked, whether there was any fair ground for doubting of the intention? It was true the testator had not given any direction for the payment of the funeral expences out of his real estate; but that was a slight circumstance, and those cases which required that circumstance, must have afforded but little evidence of intention. Upon this will the inference was strong. The minute circumstance of the probate, and the funeral expences did not occur to the testator when he was considering the large debts, for the discharge of which he had been so anxious to provide; and what was meant by the word "absolutely," but "discharged from the debts." The Lord Chancellor, however, enquired whether, as the trustees had no power to throw the funeral expences and probate on the real estate, the personal estate could be charged with those expences and not be charged with the debts. And on a future day his Lordship said, he did not think there had been any case so near the argument contended for on the part of the two sisters, as *Burton v. Knowlton*. He held a firm opinion that the doctrine was exactly as laid down in *Ancaster v. Mayer*, and took the rule at present to be, that the personal estate was the natural fund; that against the charges naturally thrown upon the personal estate, it was permitted to shew a distinct exemption, or from the whole will it might be collected, that there was an intention expressed in the will, not merely in *totidem verbis*, that the personal estate should be exempt. Then charging the real estate ever so anxiously for payment of debts, would not of itself be sufficient to exempt the personal estate. The whole doctrine would be set afloat if the argument for the two sisters were allowed to prevail, for it only came to this. There are two circumstances; one, that there is a gift of residue of the personal estate; the other, that there is a very anxious charge of debts upon the real estate. Beyond that there was no ground to stand upon. All the rest of the circumstances were merely conjectural, upon a supposed intention; and it was asked in argument, what could the testator mean by giving these sisters his personal estate [absolutely] if they obtained nothing by it? All his Lordship could say to that was, that a man giving the residue of his personal estate, did not in general mean much. It was as it might happen. The decree accordingly was, that the personal estate should not be exempt from the payment of debts.

Devise for payment of debts, however anxiously worded, is not of itself sufficient to exonerate personal estate.

The next case is that of *Hartley v. Hurlie*, 5 Ves. 540, where A. by his will directed that all his just debts, funeral and testamentary expences should be in the first place fully paid and satisfied. He bequeathed to his

Direction to pay debts and devise to trustees.

Descended estates liable to exonerate devised estates en-

A real estate descended, shall exonerate a real estate incumbered. This is a question as to marshalling assets (*pp*), and

(*pp*) Respecting which, see the note at the end of this chapter, sec. I.—
Ed.]

tees of real and personal estate in trust, to pay debts, legacies, and funeral expences, and bequest of residue to A., no exemption of residue from debts.

wife, Ann, all his household goods, plate, linen, jewels, and china, and devised all his messuages, &c. and all his monies in the funds to trustees upon trust, out of the rents of the said estates and proceeds of his money in the funds, to pay all his just debts, funeral and testamentary expences, and the several legacies in his said will after mentioned. The testator then gave legacies and annuities, and directed his trustees to pay the residue of the said rents, issues, and profits, dividends, interest, and proceeds into the proper hands of his daughter till his grand-daughter attained twenty-one, then he gave 300*l.* a year to his daughter for life, and devised the said messuages, interest monies, and proceeds upon trust, for the benefit of his said grand-daughter; "all the rest and residue of his real and personal estate, whatsoever and wheresoever, and of what nature, kind, or quality, soever the same might be, not by him otherwise given and disposed of," he gave unto his said daughter, her heirs, executors, administrators, and assigns, absolutely for ever, and appointed the said trustee, and his daughter executors. The will having been established, and the cause coming on for further directions, the principal question was, whether the personal estate was exempt from the debts? Lord Alvanley, M. R. said, the effect of the will was, that after a general direction that the debts and funeral and testamentary expences should be paid, which he considered as a direction to the executors to pay them, the testator gave certain parts of his personal estate to his wife. He then created a fund, which he vested in two trustees, who were two of his executors; for the purpose of doing what he had in the outset directed to be done, [namely,] to pay his debts and funeral and testamentary expences, and not only those, but likewise his legacies. The legacies, therefore, were without all doubt charged only on this fund.

Continuation of judgment in Hartley v. Hurle.

"The fund thus created," continued his Lordship, "consisted of the testator's real estate, and a part of his personal estate. It was contended, that this is a specific gift of the personal estate undisposed of to the testator's daughter, exempt from the payment of his debts. Whatever might have been my opinion before the case of *Tait v. Northwick*, I must now be extremely cautious before I proceed to decide upon this point beyond the case of *Burton v. Knowlton*, for it is extremely clear the noble Lord who decided *Tait v. Northwick* intimated a strong doubt of the propriety of my determination. I have had occasion, and have taken great pains, to consider that case very fully; and I think, if I was to decide it again, I should still be of the same opinion. The residuary clause in this will is not a specific gift at all, except with reference to what is before given. It is not merely personal estate, but the rest and residue of the testator's real and personal estate not otherwise given; whereas he had given all his real estate before in trust for the payment of his debts; and I must admit, his funeral and testamentary expences are included. It is impossible to suppose it any thing more than a gift of what was not before given, not as a specific bequest, but of what might have been omitted; not to the separate use of his daughter, but to her generally. I find no case, in which the testator, after beginning with a direction for the payment of debts and funeral expences, (which naturally fall upon the personal estate, and are to be paid by the executors,) has created a fund for his debts and funeral expences, and then given the residue by such words, (for it is not given to the separate use of his daughter) where it has been held, that he meant that trust fund as any thing more than auxiliary, if the personal estate should be deficient; and with that impression I am not at liberty to decide in favour of the residuary legatee as to the exemption of the subject of that residuary disposition; which I consider as only general words thrown in, perhaps without any definite intention. Therefore with some reluctance, but bound down by the authorities, I decide that there is not sufficient in this residuary disposition to exempt it from the payment of debts." The next evening the Master of the Rolls observed, that the subject of the residuary clause was not specifically the residue of the per-

generally resolves itself into a question of intention, either express or implied.

cumbered, on deficiency of personal assets.

sonal estate, but the residue of the real and personal estate not by the testator otherwise given and disposed of; and the testator had made all his real estate a fund for the debts; therefore it was the residue of the very fund, which he had created for his debts.

In *Bridges v. Phillips*, 6 Ves. 567. B. by his will devised estates to trustees in trust to sell, with power in the mean time to pay off the mortgage then affecting the same; and for that purpose to take up money; and confine or restrain such new mortgage to such parts of the premises which were not intended to be disposed of; and which would be very ample to answer both purposes; and with the money arising from such sale, in the first place to pay off all his just debts, except the said mortgage, and a charge of 4000*l.* to his sisters, which by his settlement was provided for and directed to be paid out of another fund, and in the next place to raise and pay, &c. The testator then went on to dispose of the residue of the money arising from the sale, and also of that portion of his estates which should remain unsold for the purposes aforesaid. He then devised plate, books, and furniture as heir-looms, and bequeathed several legacies, concluding his will thus: "All which said last-mentioned legacies I desire may be paid out of my personal estate (except that part given as aforesaid for heir-looms); and all the rest and residue of my said personal estate (except as aforesaid) I give and bequeath to my said dear wife, whom together with the said trustees, I appoint executrix and executors of this my will." Upon an issue directed *devisavit vel non*, the will was established. The cause coming on, on the equity reserved, the only question was, whether the personal estate was exempt from the debts. In favour of that construction of the will it was contended, that it was the case of a devise of particular, excepted estates, not by way of charge, but to be sold and absolutely disposed of; that simple contract debts were in this respect legacies; a bounty to the creditors; who had not before the means of coming at the real estate; that the bequest to the wife was as residuary legatee, and not as executrix; that the words "except as aforesaid" in the residuary disposition were material; shewing that the residue intended was the residue, subject only to a deduction in respect of the legacies given out of the personal estate, affording also an irresistible inference, that the personal estate was to go to her, subject to no other charge; and that the debts were to go out of the real estate. *Et per* Master of the Rolls. There is certainly room for conjecture that this testator did mean to throw the whole of the debts upon his real estate. But it is only a probable conjecture; there is no certainty, no clear, unambiguous intention to be collected from the whole will, that he meant *that*; and there is no distinct difference between this case and *Tait v. Northwick*. Very small differences might be pointed out; but such as would form no guide for other cases; and leading to puzzle and confuse, rather than to give assistance to those who might be called upon to advise as to the construction or frame of wills.

His Honour continued:—"There is in this, as in many cases, a very different provision for the payment of all the testator's debts by the sale of real estates. There is no provision for the payment of the funeral expences, I think, the omission of that has had full as much weight in some of the late cases as is due to it. Perhaps it is true, as stated by Lord Hardwicke, that it is more a phrase of form, than indicating a settled intention; and that either the insertion or omission of it means little. This testator then proceeds to give particular legacies out of the real estate; and it is said, to be clear those legacies must come out of that and no other fund; true; for they have no existence but by the will, and must come out of the fund the testator points out. But the debts have a separate and independent existence. The testator disposes of some part of his personal estate as heir-looms; and gives certain legacies, directed to be paid out of the personal estate. It is said, *that* shews, the debts are to be paid out of the real estate. That intention appears with no degree of certainty. He might have meant only to distinguish those legacies from the other legacies to be paid out of the real estate. No clear intention appears to make a distinction between debts and legacies; and that the latter only shall come out of the personal estate. It is said the words "except as aforesaid,"

Devise in trust to sell and pay debts. Bequest of plate as heir-looms, and other legacies. Desire that latter legacies (except heir-looms) be paid out of personal estate. Gift of residue of personality (except as aforesaid) to wife, no exoneration of personal fund.

Inference from direction to pay funeral expences means little. Semb.

Debts and legacies distinguished.

The first case we meet with of this kind is that of *Galton v. Hancock* (o). There the defendant's late husband, being

(o) 2 Atk. 424, vide S. C. Ridgw. Rep. 301.

refer to those few legacies immediately before given. That, is clear misconstruction. They refer to what is immediately before mentioned, viz. what is excepted for heir-looms. In *Tait v. Lord Northwick* there was more room for arguing, that the residuary clause had reference to the two legacies immediately before given; but it was held to mean the general residue; that it must be taken as such; and must be subject to every thing naturally a charge upon the fund, of which it is the residue, though the testator does not distinctly enumerate every thing payable out of it. The residuary legatee cannot take the fund except after discharging every thing payable out of it. Upon the whole of this will there is no indication plain of an intention to exonerate the personal estate from the omission to provide for the funeral expences. I rather conjecture, that the testator did intend, that the real estate he had set apart should be devoted to the payment of his debts. I could not be certain, that I might not be mistaken even in privately supposing that, but there is no ground, upon which I can judicially collect a settled intention."

Will directs simple contract debts to be paid out of personally, and orders devisees, in paying bonds and mortgages, to contribute proportionably. Codicil empowers trustee to mortgage real estates for payment of all debts and legacies. Personal fund not exempt from debts.

The next case also, is one wherein the personal estate was held not to be exempt from the payment of debts, and must therefore be classed under this division of the note. The testator devised his real estates to several persons for their lives, with remainders in strict settlement. He then bequeathed legacies, and gave his personal estate to W. M., he paying thereout all and singular legacies, and all the testator's funeral expences and simple contract debts. The testator then recited that he had borrowed several sums of money on mortgage to pay for the above estates, and that he was minded that the whole should be discharged in equal proportions by the respective devisees, for which purpose he ordered that all such sums as the said devisees for life should respectively pay off, should be a debt and charge against the whole of such estates in favour of the person or persons, his and their executors, &c. so paying off and discharging the same, and he directed the next taker of the said estates under his will, to repay such sums of money as his predecessor from time to time should have so paid off and expended, to such person or persons, and in such manner as his predecessor should direct, deducting from time to time the due share or proportion of such preceding taker, until the whole of such sum and sums of money should be paid off; and the testator directed the same course to be used by each of the takers in succession, until the full payment of the said mortgages; it being his will that no part of his estates should be sold. W. M. was appointed executor. By a codicil, the testator substituted the defendant as a trustee in the place and stead of the trustee appointed by his will, and declared that the said defendant and his heirs, should and might, in order to raise money for the payment of all and singular his debts and legacies with all convenient speed, mortgage (with the approbation of the taker for the time being of the said estates, according to the said will) a competent part of his said freehold estates for so much money as should be necessary for that purpose. W. M., to whom the personal estate was bequeathed by the will, insisted, that the testator having by the codicil totally varied the order of funds for the payment of his debts, not having there distinguished between his simple contract and mortgage debts as he had done in his will, but had given power to the defendant, who was not executor, to raise by mortgage of the freehold estates so much as should be necessary for the payment of all his debts and legacies; he had exhibited an evident intention to throw the whole burthen of debts on his freehold property, and to exempt the personal fund.

Judgment.

The Master of the Rolls said, there was no reason whatever either of justice or convenience, to induce him to depart from the rule laid down by Lord Thurlow, in *Ancaster v. Mayer*; requiring, that in order to exonerate the personal estate, there should be either express words, or a plain indication of that intention. Indeed his Honour wished the rule had been still more strict; and that nothing but express words had been permitted to alter the course and order of the law. Originally the rule was so. Lord Nottingham, in *Popham v. Bamfield*, had expressed himself thus: "The

seised in fee of an estate, and having borrowed a sum of money, gave a bond for it, dated May 12, 1724, and a mortgage for

law charges the debts upon the personal estate; and *nothing* can discharge it but exclusive and expressly negative words, whether in the case of *heres factus* or *heres natus*." However, after the cases that had been decided, it was too late then to say it was not open to the court to collect from the whole will an intention to exonerate the personal estate: though that intention was not expressed by any positive and exclusive words. In the case before the court, his Honour thought there was not that plain indication of intention, which Lord Thurlow's rule required. By directing that the executor to whom all the personal estate was given should pay thereout all the legacies, funeral expences, and simple contract debts, *primâ facie* there was some appearance of an intention that the testator did not mean the personal estate to be liable to debts by specialty. But that alone upon the authorities was not sufficient. There must be a charge clearly and distinctly upon the real estate, to make it liable. The testator had not in direct terms made any charge upon the real estate, but he took it for granted, that the real estate would be called upon for bond-debts and mortgages; and his object was, to secure an equal distribution of the burthen among the several devisees, who were to take the real estate in succession; and no other object whatsoever. His intention was not to favour the executor taking the personal estate against those taking the real estate; but to take care, that those who were to take the real estate, as against each other, should bear the burthen in equal proportions.

The testator directed, not, that all the specialty debts and mortgages should be paid out of the real estate, but that such sums as any of the devisees should pay should be a charge against the whole real estate, and this, the Master of the Rolls said, was the sole intention apparent on the will. Then it was contended, that the codicil operated as a total exoneration both from the debts and legacies. The codicil contained as complete a provision for all debts and legacies as could be; the trustee had power to mortgage for their payment. But this was nothing more than was the case in *Tait v. Northwick*. This case was hardly so strong in that respect, for there were more circumstances in that case, from which it might have been argued, that the testator could not have had in contemplation to burthen his real estate, merely in aid of the personal. At most, this was but the same case, and could not be contended for higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly, that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. Sir W. Grant was therefore of opinion, that there was no exoneration of the personal fund in this will before him. *Watson v. Brickwood*, 9 Ves. 447.

Neither a charge, nor a direction to sell, nor the creation of a term for payment of debts, will exempt the personal estate from that burthen. The will which gave rise to the decision, or rather the confirmation of the law in these particulars, was this:—C. T. devised his freehold manors, &c. subject to such mortgages and incumbrances as then were, or at the time of his decease might be, affecting the same, and to the payment of his debts and the legacies thereafter given, to the defendants for 1000 years; and subject thereto; he gave the said manors to his eldest son for life, with remainders in strict settlement. The will then declared, that the said term was so limited to the said trustees upon trust, in the first place, to raise the sum of 1000*l.* for his eldest daughter, and upon farther trust to sell such part of his freehold estate as they should think proper, in order to pay off and discharge all mortgages and incumbrances, if any, of his said estates, and all his debts and legacies, and particularly what should be due to his wife for any arrears of the annuity given to her by the testator's uncle's will. The will concluded by a bequest of furniture to the testator's wife, and gave all the rest and residue of his personal estate of what nature or kind soever, unto such one of his sons as should at the time of his decease happen to be his eldest son, and entitled to the possession of his freehold estates devised by the will, and appointed the testator's wife, the trustees, and the plaintiff, (who was the testator's eldest son at the time of his death) executors. By a codicil, the testator empowered the trustees to fell timber or other trees, growing on any of his estates, (except in Weald Park) for

There must be clear and distinct charge on real estate to make it liable.

Direction which could only be made under idea, that debts were to come out of real estate, not enough to exempt personal fund.

Trustees expressly empowered to raise debts and legacies by selling timber, selling estate, or otherwise, as they should think fit, no exemption of personal fund.

[904] the same sum, on the 13th of June following; and on the 11th December, 1728, made his will, by which he devised the

or towards raising money to pay off and discharge the mortgages and other incumbrances, affecting any of his estates, and also his debts and legacies; and he willed, that his said trustees should raise such money either by the ways and means directed by his will, or by sale of timber, or by all or any of such ways or means as to them should seem meet. There was also another codicil, but the same was irrelevant to the question in dispute. The bill prayed that a sufficient sum might be raised by sale of the real estate, or of the timber thereon, to pay the debts and legacies, according to the will, to be applied in exoneration of the personal estate. *Sed per Sir W. Grant, M. R.:*—

Neither charge nor direction to sell, nor creation of term for debts, will exempt personally.

The personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention. The question generally is, whether there is sufficient evidence of such intention. It is agreed, that neither a charge upon the land, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate. There is in this will a charge of debts and legacies; and a term created for payment of them; but there is nothing particular in the manner of making that charge; or the mode, in which the trust of the term is declared: nothing, denoting, that the testator intended the land to be the primary, still less the exclusive, fund. Then, it is contended, that the inference might arise from the manner of giving the personal estate: but there is nothing except the common residuary clause: "all the rest and residue of my personal estate of what nature and kind soever:" not, "all my personal estate," not "all, which I have not hereinbefore disposed of:" or any other of those forms, which in several cases have been held to denote an intention to give the personal estate as a specific bequest. Indeed, here, the residuary legatee could not take specifically what might be left, after separating from the personal estate the particular articles given to the widow; as it is admitted, that there is a charge of uncertain amount, which must necessarily fall upon it: viz. the funeral and testamentary expences; affording the inference, that he did not intend to give his personal estate as a specific bequest. Upon the general scope of the will there is nothing leading me to suppose, the testator meant to increase his personal estate at the expence of his real: on the contrary, there is a direction that any sums he may be entitled to as personal estate, charged upon real, shall be extinguished for the benefit of the person, entitled to the real. The personal estate is not given to any one by name, but it is to such son as shall be the eldest at his decease; and who in that character, he supposed, would be entitled to the real estate. The very circumstance, that the residuary legatee is first taker of the real estate, has been sometimes held a ground for exempting the personal estate. However, it is enough to say there is not upon this will sufficient evidence of the testator's intention to exempt it. *Twiss v. Lord Rous*, 18 Ves. 132.

Personal estate bequeathed in trust for testator's daughter, primary fund for payment of debts charged by the will on real estate, there being neither words nor apparent intention to exempt it.

In *Aldridge v. Lord Wallscourt*, 1 Ball & Bea. 312, Joseph Blake devised all his lands (subject to the payment of his just debts, funeral expences, and several portions afterwards charged for his daughters) to trustees, upon certain trusts; and after limiting estates in the lands to several persons, he directed the trustees, within a reasonable time after his decease, by sale or mortgage, or out of the rents and profits of the lands, to raise 3000*l.* for his daughter, Lady Errol, 4000*l.* for his daughter, A. M. Blake, and 4000*l.* for his daughter, H. L. Blake, he appointed his son, T. H. Blake, his executor, and bequeathed him all his personal estate, in trust for such purposes as he (the testator) should appoint. By a codicil, the testator, after reciting the bequest he had made of his personal estate, directed his executor to hold the said personal estate, in trust for the testator's daughter, A. M. Blake. The executor applied the personal estate in part payment of the testator's debts; and one question was, whether that was a right application of the personal fund, which, it was contended, he held in trust for A. M. Blake? Lord Manners, after stating that he collected three propositions from the decided cases, namely, 1st, That the intention of the testator must appear from the will itself, and not from extrinsic circumstances; 2d, That the personal estate being the fund primarily liable to debts, the intention of the testator to exonerate it must clearly appear; and, 3d, That neither a

estate in fee, which he had thus mortgaged, and also an estate for three lives, to the defendant his wife, and made her sole

mere charge of debts on the real estate, or a mere gift of the personal estate, was of itself sufficient to discharge the personal estate as the primary fund;—inquired if, in the case before him, there was any thing more, than a charge on the real estate? In the beginning of the will, the testator charged the real estate with the payment of his debts, and at the conclusion, he bequeathed his personal estate to his son, in trust for his daughter, for whom, in a former part of the will, he had made a provision. But, in order to exonerate the personal estate, it was requisite something more should appear, as it was admitted, that the mere charging the real estate only made it ancillary to the personal, in payment of debts. There was a provision for other parts of the testator's family, which tended to confirm this opinion, namely, where he directed his trustees, by sale or mortgage of his estates, to raise the portions of his daughters; for it was remarkable, that he made no such provision for the payment of his debts and legacies, and the personal estate was given to a daughter, who was, in another part of the will, provided for. Considering, then, the rules which had governed decisions on this subject, Lord Manners thought that this was one of the slightest cases that had ever come before the Court; it was nothing more than a charge, and if he were to hold that the personal estate was exonerated from the debts, he should decide contrary to the rule laid down by Lord Thurlow, in *Ancaster v. Mayer*, which had been so fully established by all the subsequent decisions. Adhering, therefore, to those rules, his Lordship was of opinion, that in the case before him, the personal estate was the primary fund to discharge the debts.

In another case, M. B. widow, by her will devised her lands of Ballykeel to the defendants, and ordered them, immediately after her decease, to sell the said lands to the best advantage, the money arising from such sale to be applied in the manner thereafter mentioned. The will then proceeded thus:—"In the first place, I desire that my funeral expences, and the debts which I owe at the time of my death, may be paid out of such purchase-money. Secondly, I order and direct, that the sum of ———, (then followed bequests of several small sums to different persons), who were all creditors of my late husband, be paid them by my said trustees and executors, without interest." Then followed pecuniary legacies to M^cClelland and Orr, who were relations of the testatrix; and to her executors 20l. each, in compensation for their trouble; adding "the said several sums to be paid by my said executors and trustees, out of the money arising from the sale of my said lands, which I do order to be sold with all convenient speed after my decease; and such of the said purchase-money as shall remain, after paying the said legacies and the execution of this my will, I bequeath in the following manner;" (which the will then proceeded to dispose of). M. B. died possessed of some personal property, which the above will did not embrace. The bill was filed by her next of kin, suggesting that the intention was to turn the real estate into personal, and to exonerate the personal from all debts, legacies, and funeral expences. *Sed per* Lord Redesdale, C.—"Except *Webb v. Jones*, there is not, I apprehend, a single case in which it has been held, that personal estate is exempt from payment of debts and funeral expences, without express words for the purpose, except where personal estate has been given as a specific legacy; for if it is given in terms which do not imply that it was intended as a specific legacy, it is not held to be exempt from the charges which the law imposes on it. Many cases have gone upon nice distinctions of the word "residue," whether it meant residue, after answering the payment of debts and legacies, or residue, after taking out of the fund certain specific parts. But every specific legacy is exempt from payment of debts, if there be a sufficient fund of any kind liable to the debts: for instance, if part of the personal estate be given as a specific legacy, and the real estate is left to descend to the heir, the personal estate not specifically given is first applied; but the specific legatee is entitled to have the debts which bind the heir satisfied out of the real estate, as far as it will extend. Therefore, the ground of all the cases, except *Webb v. Jones*, has been, that the terms of the disposition contained in the will were either express, or such as to raise a presumption that the

Real estate to be sold, and out of produce, debts to be paid, as also legacies, and surplus to A. Appointment of trustees executors, but no bequest of personal estate, latter fund first applicable.

Specific bequest of residue.

A bill was brought by the heir at law (p), to have the deeds and writings of the leasehold estate, the reversion in fee of

(p) *Galton v. Hancock*, 2 Atk. 424, vide S. C. Ridgw. Rep. 301.

Inference must be founded on general context.

circumstances *dehors* the will, [see also *postea*, 952, *et seq.*] Lord Eldon thought they ought to be set aside altogether, and the question decided on an examination of the entire will. If, for instance, any particular clause were taken, that by itself might be a ground for inferring an intention to exempt the personal fund; but if viewed with the general context, it may be found to have a contrary tendency. Thus the appointment of the same person to be trustee of the real estate, and executor, had been said to shew an intention not to exempt the personal estate; but if from the beginning to the end of the will an anxious discrimination between the two characters were apparent—if throughout, a most extreme caution could be traced, that all their costs sustained in the character of executors should be paid to them, not as executors, but as trustees—such an inference would fail altogether, by reason of the stronger inference of a contrary intention; so that the same expressions when used in one will, might have a totally different effect from what they would have in another.

Judgment continued.

On a comparison of all the cases, it was scarcely possible to find any two in which the court altogether agreed with itself. The only rule deducible from all that had been said was, that since it had been laid down that express words were not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated "evident demonstration;" sometimes "plain intention;" and sometimes "necessary implication;" to make out a case of exemption. But it seemed to Lord Eldon a loose way of defining these expressions to say, that the intention must be so probable that the Judge cannot suppose the contrary: he rather conceived this to be the result of the cases; that the Judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt the personal estate. Lord Eldon however took it to be certain, that it was not enough for the testator to have charged his real estate with, or in any manner devoted it to the payment of his debts. The rule of construction was such as aimed at finding, not that the real estate was charged, but that the personal estate was discharged. In the present will there was hardly a circumstance occurring, on which there had not been a great deal of judicial comment in other cases, and from which opposite inferences had not been raised.

Latest general rule of construction.

Funeral expences.

On the 1st clause of the will before the court, Lord Eldon observed, that, generally speaking, the personal estate was not only the primary fund for the payment of debts, but also for the payment of funeral expences, and of such legacies as were not made payable out of a specific fund. But, at all events, it constituted the primary fund for the payment of the funeral expences. On the 5th clause his Lordship said it should be remembered, that many of the cases turned upon an argument, that, even where legacies "therein-after given," are made payable out of a *particular fund*, such gift is confined to legacies bequeathed by the will, and the general personal estate is still liable to the legacies given by the codicil, or by any subsequent instrument; and this testator seemed to have been aware of *that*; expressly adding to the words "hereinbefore mentioned, or which I may hereafter specify in any codicil or instrument in writing, under my hand." Then, it was asked, could it be the meaning of this testator to delay his creditors and legatees, so as to make them obtain payment of their debts and legacies only out of the rents and profits as they should accrue? If Lord Eldon were asked this question any where but in Westminster Hall, he should answer in the affirmative—that, by *profits*, the testator probably meant *annual profits* only: but his Lordship understood it to be a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage, [vide as to this *Allen v. Backhouse*, 2 Ves. & Bea. 65, *antea*, of this edit. p. 73, n. (R)]. That this testator meant his legacies to be raised and

Legacies.

which was purchased by the testator, *after (pp)* making his will, and for an account of the personal estate; the heir in-

(pp) [See *postea*, 913, in *notis*.—Ed.]

paid immediately was clear; those which were given to the infants being expressly made payable into the hands of their respective fathers. But the court would not, in order to evade the distinction, go into an enquiry whether the estates, in each particular instance were of greater or less annual value. There might indeed, in particular cases, be a great difference between debts and legacies, the latter owing their existence to the will, while the former existed independently of it. But where the testator is making a provision in the same clause, for the payment of both together, the natural inference was, that he intended both should be paid in the same way.

7th. The trustees were also executors, which, although generally speaking, was an argument against the intention to exempt, might, under peculiar circumstances, be in favour of that intention. Here the sums of 300*l.* a-piece which were given to them, as this will was constituted, could only be payable out of the real estate, that being the fund appropriated to their payment; and this was a circumstance worthy of particular attention. In the 9th clause the testator adverted to the double character of his "trustees and executors;" and provided for the expences which they should sustain in either capacity. The expences incurred, as trustees of the real estate, could never be a charge on the personal, unless so expressly constituted; and here the whole expences incurred in both characters were so blended, as to make it impossible to say the testator could have meant that the costs of the real estate should be paid out of the real estate but that the costs of the personal should not be paid in the same manner. This, therefore, was a strong argument, that the testator intended the whole of the costs to be a charge on the devised estate, in exoneration of the personality.

14th. The particular articles of personal property enumerated in this provision, and which the testator directed should be kept together as objects of public curiosity, sufficiently accounted for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition, that it was merely to exempt them from the debts and legacies, from which it would then have followed, that the remainder was meant to be liable. On the 15th provision, it was observable, that there had not before been any mention of personal estate, as such, in any part of the will, and if the word "*said*" was to be rejected, what was the inference? Not that because the testator had charged his personal estate with the costs of removing these specific articles, he must, therefore, have intended that it should also be liable to the payment of his debts and legacies, for that was a conclusion that by no means necessarily followed.

16th. With regard to the peculiar wording of the residuary clause, Lord Eldon was aware, that many of his predecessors had laid down a distinction, where the bequest was of the residue of the personal estate, and where it was of personal estate, either simply or following an enumeration of articles, of such a description as to render it improbable that the testator meant them to be applied in payment of his debts. That was a circumstance of just so much weight, and no more, in the mind of any individual judge as he could at the time, bring himself to consider it fairly entitled to. On the other hand, the residuary legatee, being made tenant for life of a part of the real estate, with remainder over to his children and their issue, this had been alleged as a reason why it could not but be intended that he should take the personal estate exonerated from the payment of debts. But this also was an argument which it was proper to look at as having more or less weight, after attending to the general effect of the will, in all its parts taken together; and after all, the question was not what the testator really meant (which could never be ascertained), but what he had authorized the court to say, it was probable, was his meaning. When Lord Eldon first read the residuary clause, it occurred to him that the words "not specifically disposed of," might be taken as excluding the idea of a specific bequest to the son, but then it being "not *hereinbefore* specifically disposed of," that inference was not a necessary one; it might mean as well "not specifically disposed of to others."

Debts and legacies provided for in same clause intended to be paid in same way. Legacy for trustees, who are also executors.

Expences of trustees and executors to be paid out of real estate.

Heir-looms.

Of the residuary clause.

sisting, that the estate descended was not liable to pay the mortgage, and endeavouring to throw the burthen upon the

Lord Eldon's observations on codicil.

Then came the codicil from which it had been argued, that if there were no circumstances in the will that afforded a ground for saying the personal estate should be exempt, this codicil would be a sufficient manifestation of the intention to exempt it. This, Lord Eldon doubted, but nevertheless thought, that it deserved great consideration as coupled with the provisions of the will. The effect of the codicil was such, as it was probable the testator himself did not contemplate. It connected itself with the entire will, for if any one of the numerous provisions of the will should be disputed by any person whatever, it directed, that the expences of litigation should be delayed not out of the personal estate, which was the natural fund, but out of the real estates before devised to the son. The testator had before devoted another fund for payment of the costs of his trustees and executors, both as trustees and executors; and on looking through the precedents, it was impossible, Lord Eldon said, to deny that this was a circumstance on which great stress had always been laid; namely, that where the real estate is made liable to the payment of such expences as exclusively regard the administration of the personal estate, such as the costs of probate and other costs sustained in the execution of the will.

Inference from real estate being charged with costs relating to administration of personal estate.

Conclusion of Lord Eldon's judgment in Bootle v. Blundell.

"It is on these grounds," added his Lordship, "that after all the attention I have been able to give to this case, I feel convinced that the testator did not intend his personal estate to be subject to the payment of his debts. In saying this, I do not mean it should be inferred that it is, in my opinion, impossible that other Judges, after looking through the cases with the same attention that I have done, might come to a conclusion respecting this will, the reverse of that which I have come to. On the contrary, I hold that a difference of opinion will always be unavoidable in cases of this nature, unless they were brought back to the old rule, that nothing but express words should have the effect of exempting the personal estate; yet, although with all the respect that is due to those who have gone before me, and to the results of their deliberations on the arguments suggested to their notice, I shall never be able to reconcile them so as to satisfy myself entirely with regard to the grounds on which they have built their decisions, I am able to say that in the present case, I am convinced the meaning of this will was that which I have stated it to be." *Bootle v. Blundell*, 1 Meriv. 239.

Difference of opinion on cases of intention always unavoidable.

Sound rule stated in preceding case.

Two other cases have occurred which it will be necessary to add to this note. In the first (*Gittins v. Steele*, 1 Swan. 28.) the Noble Lord who decided the preceding case, said, "we have now reached the sound rule that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls, and was confirmed by myself in *Bootle v. Blundell*." Alluding, then, to the question in the case before him, his Lordship further remarked, that the personal estate could only be exempt from the payment of debts by the substitution of a sufficient fund, and 'it continued subject to the claims of creditors in the event of a deficiency in the fund provided. But legatees and devisees, as volunteers, were not entitled to resort to any other than the particular fund, which the testator or the law had assigned. If they were insufficient, the court, whatever might be the hardship of the case, could not supply other funds. 1 Swan. 30.

Legacy fails with particular fund whereon it is charged.

Devise in trust to sell and pay certain mortgage debts, and two legacies, and also such other just debts as personal estate should not extend to pay; bequest of residue of personality, which should exceed

The last case we find in the books is one recently decided in the Exchequer Chamber, before the Chief Baron sitting in equity, where Lord Wentworth by his will devised his Rowney estate to trustees in trust, to be sold, and declared that the said trustees should stand possessed of the monies to arise therefrom, and of the rents and profits in the mean time, upon the following trusts: first to pay off a sum of 2000*l.* charged on some part of the said estate, and which sum was a charge upon the Rowney estate by mortgage before it descended to the testator; 2dly, to pay off a sum of 20,000*l.* secured by mortgage of part of the testator's Leicestershire estate; and, 3dly, to pay the sum of 5000*l.* to the testator's wife, and the sum of 3000*l.* to the plaintiff Noel, and also to pay such part of such other of his just debts, and of the other pecuniary legacies by him therein-after given, or which he should give or bequeath as his personal estate not thereafter specifically bequeathed, should not extend to pay. And after

defendant, to be discharged out of the personal assets, and if those should be deficient, out of the estate devised to her. For the wife, it was argued, that if the personal estate was not sufficient to pay the mortgage, the estate, descended upon the heir, should make up the deficiency, and the estate devised

such payments, the trustees were directed to invest the residue upon certain trusts. Then (after giving other pecuniary legacies) the testator directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty. He then gave all the rest and residue of his personal estate and effects whatsoever, which should exceed the payment of his debts not otherwise provided for, legacies, funeral, and testamentary expences, to his wife; and he appointed her and his trustees executrix and executors of his will. The wife died in the testator's lifetime, and the question was, whether the personal estate was exempt from the payment of debts in favour of the testator's next of kin. In the course of the argument, the Chief Baron said, that the legacy duty was a charge on the legacy, not on the estate; but if the legacy were given free of duty, it was an increase of the legacy itself, and ought therefore to be paid out of the same fund, which was provided for payment of the legacy.

On the principal point his Lordship stated his opinion to be, that as there could be no doubt that the primary fund for the payment of debts and legacies was the personality; if a testator should give his residuary personal estate to a legatee discharged by means of his real estate of debts, and that bequest should lapse, the bounty intended would be taken away, and the testator must be considered as dying intestate as to that: not that the residuary clause was expunged: for it still formed part of the will and probate, and might be resorted to, to explain the intention of the testator; but the estate was, according to the determination in *Waring v. Ward*, (see ante, note (A), p. 825, of this edit.) discharged from the exemption, whatever the real intention of the testator might have been. Looking at the words of the will in the present instance from one end of it to the other, his Lordship saw no general exoneration of the personal estate even intended; he saw none but a personal exemption, and that was gone, there being no person to take advantage of it, and therefore the testator must be considered as having died without having given his personal estate in any particular manner. With respect to those legacies which were thrown upon the real estate only, the testator declared that the Rowney estate should be applied to the discharge of the legacies "*after mentioned*," so that the legacies *before* mentioned did not seem to have been thrown upon the personal estate, but were confined to the real estate. Lord Chief Baron Richards was therefore of opinion, that the arrangement which should be made was, an application of the personal estate to pay the debts of Lord Wentworth, and then the real estate to be sold to supply any deficiency, and what remained to go to the devisee. But his Lordship could draw no distinction between a direction to sell to pay particular debts, and a charge, and whether it was to be sold out and out for the payment of the debts, or in aid only, it seemed to him to be the same thing. The decree was, that the mortgage of £20,000l. charged on the Leicestershire estate, being the proper debt of the testator, should be paid out of the personal estate; if that fund were insufficient, the deficiency to be supplied out of the produce of the sale of the Rowney estate; that the mortgage of £2000l. on the Rowney estate not being the testator's own debt, and the legacy to Noel being expressly charged on the produce of the sale of that estate, should be raised and paid out of the monies to be produced by sale thereof, and that the legacy to the wife should sink into the Rowney estate, for the benefit of the devisee. *Noel v. Henley*, 7 Price 241, et vide observations on this case, ante, 825, of this edition, *in notis*.

In concluding this division of the chapter, it may not be amiss to remind the student that by way of caution and to prevent all question on the intention of the testator, an express clause, exempting the personal estate from the payment of the debts or any particular debt or legacy, should always be inserted in the will, if such clause be accordant with the intention.

debts not otherwise provided for, an exemption of personal estate from mortgage debts.

Legacy free of duty.

What is an exemption in favour of residuary legatee, not so in favour of next of kin.

Practises.

to the wife should not be affected, while the real assets were sufficient.

(Purchase of reversion after will, a revocation.)

[905]

On the first hearing of the cause, Lord Hardwicke observed (q), that it having been admitted, that the purchasing the reversion, after making the will, was clearly a revocation, *pro tanto*, the main question was, whether, where a real estate was devised with an incumbrance, and another descended upon the heir, the devisee was entitled to have the estate exonerated?

His Lordship was of opinion, that the devisee was not so entitled in a court of equity (r).

No precedent had been cited to him where it had been so determined, or where the very point had come directly before the court (s).

This was a case where the testator himself had laid a real burthen on the lands devised (t), and quite different from the case of a general bond-debt, to the payment of which the personal estate should be applied first. The mortgaging it was a material circumstance, for how could a court of equity say that the testator did not intend it should pass, *cum onere*, when there was so strong a presumption that he did? that an heir at law, who had an estate descended upon him, was to be considered in the same light as if the estate had been actually given to him; and there was no colour to say (even laying aside the expression of an heir at law being a favourite of a court of equity) that a devisee should be preferred to him in equity.

[906]

But, upon a re-hearing, his Lordship changed his opinion, on the grounds that, before the statute of fraudulent devises, which gave a remedy to specialty creditors against devisees, the remedy was against the heir only; at common law the devisee was not liable to the demand, because the descent was broke; and the rule of equity, before the statute, did not differ from the rule of law, unless there was some particular circumstances in the case; that the statute made no difference, as between the heir and devisee, the fraud provided for thereby, being only, such as went to defeat the creditors, and no favour was thereby intended to heirs at law. The enacting clause made wills void against such creditors, but left the law as it was before, as to heirs. Then, as in case, before the statute, there had been a general debt by bond or covenant, wherein the heir had been bound, without any mortgage to secure it, the heir must have

(q) *Galton v. Hancock*, 2 Atk. 424, vide S. C. Ridgw. Rep. 301.

(r) *Ibid.*
(t) *Ibid.*

(s) *Ibid.*

discharged it, and could have had no contribution from the devisee; so, since the statute, satisfaction should be first made out of assets descended upon the heir at law, and if that should prove deficient, but not otherwise, then the devised estate should be liable. That there being a mortgage, would make no difference, for a mortgage was a debt by specialty, and the land only regarded as a pledge or security for the money. That on the same principle, which induced the court to direct the personal estate to be applied in payment of specialty debts, in favour of the heir, it raised an equal equity in favour of a devisee, circumstanced as in the present case. By the will, the land was given to the wife, but the mortgagee might take his remedy against the devisee, or the heir, at his election; but as in a case between the heir and the executor, the election of the creditor would not determine which ought properly to be charged, or vary the right as to the funds, so neither could determine, as between the heir and the devisee; but the devisee would be entitled to stand in the place of the creditor, in this case, as the heir would to stand in the place of the creditor in the other, and to be exonerated by him for what he had disbursed. Then the court would not put the parties to this circuitry, but give the devisee the benefit directly against the heir at law (L).

But another point was raised in the case of *Galton v. Hancock*, between the heir and devisee, where there was a general charge of debts. And the answer of Lord Hardwicke to the argument on the effect of such general charge, laid the foundation for farther distinctions, which have been taken up and established in subsequent cases. His Lordship considered such general charge, as affording no ulterior inference beyond that in favour of creditors.

[907]

[908]

Descended estate must exonerate devised estate encumbered, though debts are charged generally on all testator's lands.

Though personal estate be exempted, yet if real estate be insufficient, former must be applied.

(L) The principle to be collected from the whole of this case is, that lands descended must exonerate mortgaged lands devised, whenever the personality is exempt or exhausted. Et vide postea, 910 and 911, in the notes.

It may be proper to notice here a case which occurred in point of time before that of *Galton v. Hancock*, ubi supra. The case was this:—A man by his will, expressly devised his real estate to trustees, for the payment of all such debts as he should owe, and also for the payment of legacies and funeral expences; then followed some pecuniary legacies and bequests of specific parts of the personal estate, and then he gave all the residue of his personal estate to his executors. Lord Hardwicke was of opinion, that this came within the rule laid down in *Adams v. Meyrick*, antea, 859, and observed, that where real estate is expressly devised for payment of debts, the personal estate is exempted, [sed quære this general expression, and see antea, 819.] but if the real estate be not sufficient the personal estate must be applied, and if there be any residue the executors are entitled to it. *Bucknell v. Page*, 2 Atk. 78. Mr. Sanders adds, “there was a mortgage upon the estate so devised, which was also decreed to be paid out of the monies arising by the sale thereof. Reg. Lib. A. 1740, fol. 264.”

For equity between heir and devisee is not altered thereby, but only condition of creditors improved.

[909]

This doctrine confirmed.

It was speedily discovered, that, if this conclusion of Lord Hardwicke, upon the circumstance of a general charge, was well founded, it would necessarily follow, that where a testator made such a general charge, and subject thereto, devised the whole of his estates from the heir, and afterwards acquired other estates, which he permitted to descend, the descended estates would be first liable, notwithstanding the charge ; and this is also a point necessarily implied in the general point decided, in the case alluded to ; for on this ground, such charge makes no difference, as between the heir and devisee, but only improves the condition of the creditors, by giving them a particular specific fund, to which they may resort in the first instance, but it leaves the question, as to who shall ultimately bear the burthen, open ; and then equity steps in, and fixes it upon the heir, as having in relation to the testator a permission, not a positive benefit, and therefore having a weaker equity.

The case of *Wride v. Clarke* turned upon this principle (u). There C. died, seised of several real estates, and possessed of personal estate, having made his will, and thereby directed, that all his just debts should be paid, and charged all his estate, real and personal, with the payment of the same, and subject thereto, he devised all his real estate to his wife in fee, and appointed her sole executrix. The testator purchased additional estates, between the time of making his will and his death, which descended to his heir at law. The debts of the testator exceeded the value of his personal estate, and, on a bill filed by the creditors, the question was, which estate should be first applied, the estate descended, or the estate devised ? and it was decreed at the Rolls, that after application of the personal fund, the descended estate should be applied, previous to the devised estate in satisfaction of the debts.

[910]

Real estate devised (though subject to mortgage) never applied to debts, till descended and personal estate exhausted (w).

So, where T. seised in fee of considerable real estates (v), subject to a mortgage to P., made his will, and thereby, as to his worldly estate, either real or personal, after payment of his debts and funeral expences, gave and disposed thereof in manner following : He gave to his sister L., an annuity for her life, to be paid to her by the person or persons, who, for the time being, should be seised of his real estates under his will, and

(u) Cited 2 Bro. C. C. 261.

(v) *Davies v. Topp*, 2 Bro. C. C. 524.

(M) So, per Lord Hardwicke, in *Palmer v. Mason*, 1 Atk. 504, where there is a specific devise of lands the specific legatee shall never contribute, upon an average with the heir at law, towards satisfaction of creditors, while the real assets of the heir are sufficient.

he also gave several pecuniary legacies, and he charged and made chargeable all his real and personal estates (except part of his personalty given as heir-looms) with the payment of his debts and legacies aforesaid; and, subject thereto, he devised all his manors of W. and V., and all his real estates in the counties of S. and M. (which were all the real estates he had at the time of making his will) to his nephew R. L. for life, on his obtaining the King's licence to bear his name and arms, remainder to his first and other sons, in strict settlement, remainder over; and he gave several articles of personal estate, to be enjoyed as heir-looms by the devisees of his real estate, and as to all the rest of his personal estate, subject to the payment of his debts, legacies, and funeral expences, he gave the same to his nephew R. L., and appointed him executor to his will. After making his will, the testator purchased a freehold estate at V. A bill was brought for an account, and an application of the personal estate in payment of debts and legacies, and in case the personal estate should not be sufficient, then to establish the will, and to have the deficiency raised by sale or mortgage of a competent part of the real estate. And an account was directed, and the personal estate, not specifically bequeathed, was ordered to be applied in payment of the debts, legacies, and funeral expences, in a course of administration; but in case such personal estate should not be sufficient for the payment of the testator's debts, his Honour declared that the deficiency, as to what should be remaining due to the mortgagee, and the other specialty creditors, ought to be raised by sale or mortgage of the real estate, descended to the heirs at law; and the real estates devised by the will were not directed to be applied to the payment of the testator's debts and legacies, until all the other funds were exhausted; and this decree was affirmed on appeal to the Chancellor (N).

[911]

(N) And has been followed (though not cited) in the late case of *Barnerell v. Lord Cawdor*, 3 Madd. Rep. 453. The circumstances and judgment in that case were briefly these:—The testator by his will requested that his just debts (not meaning those that might happen to be liens on any part of his real estate at the time of his decease) should be paid as soon as might be after his decease out of his personal estate, by his executrix thereafter named, and he thereby gave and devised all his freehold and copyhold estates, &c. in England, Wales, and in the Island of Jamaica, and all other his real estate whatsoever and wheresoever situate, subject to the incumbrances which might affect the same at the time of his decease to certain persons therein named, to the use of his first and other sons successively in tail male, with remainders over; and after giving certain annuities and money legacies to several persons, he gave to his wife all his plate, goods, money, and rents, and all the rest of his personal estate and effects whatsoever, and wheresoever, and of what nature, kind, or quality soever

Testator exempts personally from payment of mortgages on real estate, which he devises to C. subject to incumbrances. Descended estates held first liable to discharge mortgages.

[912]

Devise to A. for 500 years, in trust to pay debts, exonerates descended estate till trust fails.

But where there was a *particular* charge for the payment of debts; as where a testator being in possession of two estates, devised one, charged with a term for that purpose, the devised estate was held to be first liable. Thus, where an estate was made subject to a five hundred years term, by the owner's will (x), for the payment of debts, and other lands descended, Lord Hardwicke held, that the estate so subjected must first be applied, before the creditors could come upon the estate descended on the heir at law: his Lordship observing, that if a testator has created a particular trust out of particular lands, and subject to that trust, devised it over, the devisee can take no benefit but of the remainder, after the whole burthen upon it discharged; and as to that the heir at law stood in a better place than the devisee did (o).

(x) *Powis v. Corbett*, alias *Corbett v. Kynaston*, 3 Atk. 556. [See *ante*, 827, 830, and 831, for instances of

particular estates being devised or charged for payment of debts.—*Ed.*]

Primary fund not exonerated, merely because another fund is provided.

Particular estate devised for debts, whether in hands of heir or devisee, must, after personal estate, discharge mortgages.

not therein by him before disposed of, as and for her own proper goods, estate and effects for ever, subject to the payment only of such debts as he should owe as should not be liens on or secured upon any of his real estate, it being his intention that no part of his personal estate should go to exonerate his real estate, but that the same should go to his said wife, subject only to such debts [as should not be liens] on his said real estates, and to his said legacies and funeral expences; and the said testator made his wife sole executrix. The personal estate being given away, subject to the payment of all the testator's debts (except such as were liens on the real estate), and such part of the real estate upon which there were liens being devised to the defendant, it became a question whether the devised estates were liable to satisfy the incumbrances on them, or whether the descended estates were liable to discharge such incumbrances. The Vice Chancellor said the descended estates must pay these debts, unless the testator had expressed a different intention in the will. The personal estate was the primary fund for the payment of debts, and the descended estates the second. The testator had expressly directed that his personal estate, the primary fund, should not be applied in payment of these debts, but he had no where said, that the descended estates, the secondary fund, should not be so applied. The estates charged with the mortgages were indeed devised, subject to the payment of the incumbrances upon them, but a primary fund was not exonerated merely because another fund was provided. Such other fund was considered as auxiliary only, unless the primary fund were expressly exonerated. To exonerate the descended estate, there must not only be a clear intention to subject the devised estate to the payment of the debts, but also a clear intention that the descended estate should not be subject to the payment of the debts. Et vide *Watson v. Brickwood*, 9 Ves. 447.

(O) In *Bateman v. Bateman*, 1 Atk. 421, R. B. by his will, after devising copyhold lands to his wife and children, provided that if his personal estate should not pay his debts, then that his executors should raise the same out of his said copyhold premises. The testator upon his marriage, had settled some freehold lands upon his wife and children, and had covenanted that they were free from incumbrances. It happened, however, that these lands were subject to a prior mortgage. It was decreed, that the plaintiffs (the wife and children) were entitled to have the settled estate exonerated of the mortgage out of the personal estate and copyhold estate devised for payment of debts. See *Mr. Sanders' n. (1)*.—So in *Lanoy v. Athol*, 2 Atk. 444. S. C. 9 Mod. 398, it was held, that there being a borrowing and a lending in the case of a mortgage, the real estate should be considered

And I presume the same inference would follow, if a person, seised of three or four estates, devised one estate *specifically* for the particular purpose of paying his debts; that estate would be first applied even in favour of the heir; for these are questions of intention. Then, "what is the inference furnished by the circumstances in these cases? It is this: Where a testator gives the whole of his estate, at the time of the devise, subject to a *general* charge, he means to give the devisee all that can be saved of his affairs, after payment of

Estate charged with debts to be first applied in favour of heir.

Semb. (P)
[913]

only as a pledge, and the personal estate should be first liable, but if the personal estate should prove deficient, then it was decreed, that the mortgages must be paid out of the freehold and copyhold estates devised by the will for payment of the debts. A decision on a similar principle appears to have been made in *Tweddale v. Coventry*, 1 Bro. C. C. 240. There Sir R. W. seised in fee of estates in C. which were mortgaged to a considerable amount, and also of an estate in the Isle of Wight, devised the latter estate to his executors as trustees for 21 years, among other uses, to pay his *bond and book debts* if his personal estate should not be sufficient, and by a further clause to *pay all his debts*. This trust term, after the personal estate, was held liable to exonerate the estate at C. from the respective mortgages thereon.

(P) Lord Eldon was of a different opinion in *Harmood v. Oglander*, 8 Ves. 125, and *Milnes v. Slater*, ib. 306. In the latter case it was held, that where a testator going beyond a mere charge, creates a particular fund for payment of his debts, that fund shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not, and of the personal estate even in favour of the next of kin taking it for want of disposition. Lord Eldon on this occasion went fully into the subject of exoneration as between the heir personal representative and devisee, and in the course of his judgment remarked, that the authorities had gone this length, viz. that where the heir takes not by the intention, but in the absence of intention, the devisor is understood as having denoted in a question between the heir and the devisee, that the estate devised shall first go to the debts, though the estate so devised for payment of debts may not be legal assets, and the descended estates may be legal assets, which made it a strong operation of the court to throw the debts upon lands, which in some cases might be equitable assets, and from lands which might be legal assets.

Mere charge of debts no exoneration of descended estate; sed contra, if particular fund be created.

His Lordship further remarked, that as there must be something operating as an exoneration, either expressly or by shewing an intention to substitute some other fund, the question in the case before him resolved itself to this, whether the testator had, out of the mortgaged estates, created another fund. The words of the will were, "And I farther declare that if at the time of my decease there shall be any mortgages or other incumbrances affecting my estates at B. and T. or any of them, the same shall not be discharged out of my personal estate, nor shall any part thereof be applied towards the same, but shall remain charged upon my said estates respectively until discharged by the several tenants for life," to whom the said estates were respectively limited. "I perfectly agree," continued Lord Eldon, "that, if the testator has done no more than generally subjecting the mortgaged estates, merely leaving them subject, as the law would, and the tenants for life and those in remainder take, subject to the incumbrance as if he had said nothing, that is not enough to protect the descended estates; but he may create such a fund by raising a particular interest in the mortgaged estate to pay the mortgage; which will have the same effect as if a particular interest was created in any other estate for that purpose. Then has he created that fund; and has he created it with reference to the descended estates, or only as to the personal estate? My opinion is, that he has created a particular fund by those words; though I do not believe he had the least comprehension what was the meaning of this part of his will. But the court cannot reject words having an obvious meaning

Devise of mortgaged estate subject to incumbrances no exoneration of descended estate or personal fund.

"his debts. If he afterwards becomes possessed of an estate by devise or purchase, thus much is clear, by charging his estate with payment of his debts, it could not be in his contemplation to charge an estate which he actually gave in favour of an estate which he had not. In such case the estate descended cannot be stated as the object of his intention to exempt. But if a testator has two estates when he makes his will, and charges one, either generally, or by creating a term thereout, the inference is, that he means to exempt the other."

Generally, descended estate must exonerate devised estate, though latter charged with debts; and contra, if devised estate be expressly pointed out in aid of another fund, provided for that purpose (q).

The case of *Donne v. Lewis* is another instance (y), shewing, that whether the intention was to charge the estate specially or generally; that is, whether the testator has selected any part of his estates which by his will should be first applied, or whether the charge is only to subject his estates to the payment of his debts, which otherwise perhaps could not be applicable to them, is the main question on such occasions.

(y) *Donne v. Lewis*, 2 Bro. Ch. Rep. 257.

upon a suspicion that the testator did not know what he meant. Here is an estate given to his daughter for life, and afterwards to her children, according to her appointment, and in default of appointment in strict settlement, followed by remainders to several tenants for life in succession, and various limitations of the inheritance in tail. If the testator had died an hour after the execution of his will (and then he would have had only personal estate), he has most expressly said the personal estate should not be applied to the mortgages, and that they should remain charged until discharged by the tenants for life. There is great nicety in saying that means only till the tenants for life think proper to discharge them; that they are only to keep down the interest at most, and no farther obligation upon them was intended. If that is so, why are those words used very differently from the words 'subject to the mortgage,' in *Serle v. St. Eloy* [antea, 830, of this edition]? At best they look to the event of payment, not by the owners of the inheritance, but by the tenants for life. The testator's meaning must be taken to be to impose upon the tenants for life the necessity of sacrificing the life estate for the exoneration of the owners of the fee. Many cases might be put, in which descended estates may be applicable, where the personal estate would not. Suppose all the tenants for life, in the present instance, dead, or did not live long enough: in one case, there would be no fund; in the other, not a sufficient fund. Then the personal estate being directed not to be applied, the descended estates must be applied to the exoneration." *Milnes v. Slater*, 8 Ves. 306.

Devised applied before descended estate, when.

(Q) This case was said by the Master of the Rolls, in *Manning v. Spooner*, 3 Ves. 117, to have been determined on very full consideration and discussion, and on principles which have been constantly acted on ever since. Taking that case for his guide, the Master of the Rolls determined, (3 Ves. 114) that though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate be selected and appropriated to the debts, it will be liable before the estate descended: but this arrangement, his Honour said, did not bind creditors; and he further held, that it was immaterial whether the lands descended were acquired before or after the date of the will; cf vide 2 Bro. C. C. 252; and *Tweeddale v. Coventry*, 1 Bro. C. C. 240, as to the latter point.

In that case L. made his will (z), and thereby desired, that all his just debts, funeral expences, and the charge of proving his will, might be paid as soon as convenient after his decease, and gave and bequeathed to his wife S. L. the sum of £200l. and also several specific parts of his personal estate. He then devised to the said S. L., and to T. L. and I. B., and to the survivor of them, and the heirs, executors, and administrators of such survivor, according to their respective estates and interests therein, all his freehold, copyhold, and leasehold estates (not thereafter particularly bequeathed), together with all his ready money and book-debts, which should be due and owing to him at the time of his decease, in or upon account of his several trades or employments of a builder and feather-merchant, upon trust, that they the said S. L., T. L., and I. B., &c. should collect and receive the said book-debts, and sell and dispose of his freehold, copyhold, and leasehold estates, *and out of the money arising thereby, pay and discharge all his debts and legacies whatsoever* (except the debts secured by mortgage of the estates thereafter specifically bequeathed, which were to be paid and discharged by the devisees of those estates respectively); and in case the money so to be raised by his said trustees should not be sufficient to discharge the said debts and legacies, then he willed, *that the deficiency should be charged on the several estates thereafter given, or bequeathed to or for the use of his three sons and two daughters respectively, and that one-fifth part of such deficiency, with interest thereon, at five per cent. from the time of his decease, should be paid by each of his said sons and daughters.* He then proceeded to devise very fully and particularly to, or in trust for, his five children, respectively, five several estates; four of which were leasehold, the other freehold, and three of the leasehold estates were subject to mortgages or other incumbrances; but in case it should be necessary to pay off and discharge the mortgages, or other incumbrances upon any parts of his estates before the trusts thereby created, concerning such estates respectively, should be fully executed and determined, the said testator thereby empowered and directed his said trustees, and the survivor of them, &c. as the case might require, to sell and dispose of such respective estates, in the best manner they were able, and after payment of all charges, incumbrances, and expences thereon, lay out and invest the residue of the money

[914]
Donne v. Lewis.

[915]

[916]

(z) *Donne v. Lewis*, 2 Bro. C. C. 257, et vide *Manning v. Spooner*, 3 Ves. 114.

Donne v. Lewis. to arise by such sale, in the purchase of government securities, in the names or name of his said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, as the case might require, to and upon the like uses and trusts as were thereby expressed and declared, of and concerning such estates respectively, or to such of the said uses and trusts as should be then existing and capable of taking effect. And the said testator gave all the rest and residue of his estates, real and personal, of what nature, kind, or quality soever, unto and among all and every his three sons and two daughters, in equal proportions, share and share alike; and the said testator made the said S. L., T. L., and I. B., executors of his will.

[917] A bill was filed to have the trusts of this will performed, and for the necessary accounts. The Master made his report, by which it appeared, that the general personal estate, together with the trust fund, consisting of the leasehold premises, not specifically bequeathed (for in fact the testator had no copyhold estates whatsoever, and no freeholds but those specifically devised), and the ready money and book-debts were not nearly sufficient to pay the debts, which amounted to upwards of 5000*l.*, besides those specifically charged on the devised estates, and that the legacies amounted to 2000*l.* It also appeared, that *the testator purchased a small freehold estate after the time of making his will*, which was worth about 300*l.*, and which therefore descended on his eldest son and heir at law.

The single question was, whether the descended estate should be applied in payment of the debts and legacies (there being specialty debts in fact much beyond the amount) in preference to the trust fund devised for that purpose, or before the specific devisees should be called upon for their contribution according to the directions of the will?

[918] *Et per* Lord Thurlow (*a*), the question will always be this, and the only one that can reconcile all the cases: Are the terms of the will only a general indication, that the testator *means* to subject his property to his debts, and not to be a knave (as many of the cases treat the man who does not); or does he mean more, and to make a particular provision for the purpose? It is unnecessary to enlarge on the point of the mortgage debts, for he has provided for the payment of them in so distinct a manner, that even the case of *Serle v. St. Eloy* could never touch this case (*b*). They are clear deductions

(*a*) *Et vide* *Manning v. Spooner*, 3 Ves. 114.

(*b*) *Supra*, 887.

from the property devised. But the question arises more on the general provision for debts. There are two provisions, consisting of his ready money and book-debts, and also some leasehold estates, which very probably were an enumeration of all his personal estate not otherwise specifically disposed of; the next was a contribution from the devisees. The supposed intention to be imputed to the testator, is, that he means to exempt Whiteacre where he charges Blackacre; but this cannot be applicable to Greenacre, which he had not until afterwards. But the fallacy is, that there is no intention in fact, either as to Whiteacre or Greenacre, but only as to Blackacre; and he leaves both the others quite clear of his intention, which does not apply at all more to Greenacre than to Whiteacre, he being totally silent as to both. And you must execute his intention as to Blackacre; and if Blackacre is not sufficient, the justice of the case will be executed as to creditors, notwithstanding his intention, and only under the common principles of law. Therefore the legacies would not be charged on the descended estate directly, but it must be done, if at all, by circuitry. In this point of view then, is there, in this will, such an expression of intention, with regard to devised estates, as to affect a property which the will takes no manner of notice of, or is it a direction how, and out of *what funds*, the debts and legacies shall be paid? He *directs all the trust fund to be converted into money, and to be applied, &c.*; and he gives interest at five pounds *per cent.* on the legacies from his death, which is beyond the ordinary course of this court, and the intention usually imputed to testators. Having charged these estates *specially*, it is impossible to execute this purpose without, by consequence, exempting the estate descended. In this view, I take it to be consistent with the cases of *Davies v. Topp*, *Wride v. Clark* (c), *Corbett v. Kynaston*, *Powis v. Corbett* (d), and *Gallon v. Hancock* (e), (though there was a difference in those cases as to the consequence of those principles) to say, that the trust fund must be first applied, and if that is deficient, as it appears to be, then, that the devisees must contribute in fifths, before the estate descended can be called upon.

On the whole, therefore, the rule, as to the order of affecting assets in such cases, is this (f): First, that the general personal estate is to be applied. Secondly, ordinarily speaking, estates devised for payment of debts. Thirdly, estates de-

Donne v. Lewis.

Presumption that testator in charging A. means to exempt B. inapplicable to estate purchased after will.

[919]

[920]

Order of assets,
1. *Personal estate.* 2. *Estate devised for debts.* 3. *Descended estate.* 4. *Devised estate.*

(c) *Supra*, 909, 910.(d) *Supra*, 912. (e) *Supra*, 903.(f) *Per Lord Thurlow*, 2 Bro. Ch. Ca. 263.

A. purchases estate subject to mortgage, and covenants with mortgagee to discharge same. A.'s personal estate not liable to exonerate land purchased (s).

scended. Fourthly, estates specifically devised, even though they are *generally* charged with the payment of debts (R).

And if one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it; [for in this case the personal estate of the purchaser has not received any addition to its fund by means of the mortgage.—*Ed.*]

[921]

Thus, where B. agreed to purchase an estate of A., which was then subject to a mortgage of 2000*l.* to D. (g), and accordingly, by indenture of lease and release, between A. of the one part, and B. of the other part, reciting the mortgage, and that B. had contracted with A. for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned, that was to say, to the mortgagee all such sums as should be due to him upon the said mortgage, on the first of May next ensuing, as also to pay such sum of money as should remain after deducting the money due on the mortgage to D.; it was witnessed that the said A., in consideration thereof, did grant, &c. to the said B., his heirs and assigns for ever, all the said premises, &c. and in the covenant against incumbrances, the mortgage and securities were excepted. And the said B. did covenant, that he, &c. would well and truly pay, or cause to be paid, to the said D., the said sum due in manner aforesaid, and would indemnify the said A., his heirs, &c. and his goods and chattels, land and tenements, from all costs and charges, &c. in respect of the said mortgage. B., after completing the purchase of A., made his will, and died [without having discharged the said sum of 2000*l.* due on the mortgage to D.], and then a question arose between his personal representatives, and the devisees of this estate under the will, whether, from the nature of the contract, the personal

[922]

(g) *Tweddell v. Tweddell*, 2 Bro. Ch. Rep. 101. 152.

(R) From the case of *Donne v. Lewis*, ubi supra, p. 913, Sir R. P. Arden, M. R., collected that there were four classes of estates to be applied in payment of debts; 1st. The general personal estate, unless exempted expressly or by plain implication; 2dly. Any estate particularly devised for the purpose, and only for the purpose of paying debts; 3dly. Estates descended; 4thly. Estates specifically devised.—There is little difference between this expression of the rule and that of Lord Thurlow's in the text. For the more modern enumeration of the order of funds for the payment of debts, see antea, 325, of this edition, n. (E).

(S) This is good law. It was cited and approved by Sir W. Grant, M. R. in *Hancox v. Abbey*, 11 Ves. 189.

estate of B. (respecting which he had made no disposition in his will), was liable to be applied in discharge of the mortgage? *Et per curiam*, it is a clear rule, that the personal estate is never charged *in equity* where it is not at law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims (*h*). In respect of the rule of marshalling assets, it is that it must be a debt affecting both the real and personal estate; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors (*i*) (T).

And if money on mortgage be *not* properly the debt of the owner of the mortgaged estate, that estate alone shall bear the burthen thereof, notwithstanding that *the owner*, by his will,

Personal estate never charged in equity, where not at law.

(*h*) Vide *Clarke v. Sampson*, 1 Ves. 100, et 2 Ves. jun. 65.

(*i*) Vide *Wood v. Huntingford*, infra, 943, et note distinction, [948.

See also Sir W. Grant's observations on the principal case, *infra*, p. 951, *in notis.*—Ed.]

[923]

An incumbered estate descends to testator, who devises it, subject to mortgage, and

(T) This case of *Tweddell v. Tweddell*, induced the decision in *Butler v. Butler*, 5 Ves. 534. In that case there was a mortgage from Brent to Barnard, for 2000*l*. Brent conveyed his equity of redemption to Butler, subject to the mortgage, to which conveyance Barnard was not a party. Butler then made his will, and directed that all his just debts and funeral charges should be paid out of his personal estate and effects, and gave to trustees and their heirs, among other hereditaments, the estate he had lately purchased of Mr. Brent, to the use of his eldest son G. Butler, for life, with remainder to the heirs of his body, with remainders over; he gave other freehold estates to the use of his son (T. Butler) for life, with remainders over; and all his leasehold and personal estate, after payment of his debts, as aforesaid, and legacies he gave to his executors, in trust to sell the leasehold, and after payment of his debts, legacies, and funeral charges, in moieties to his two sons. G. Butler, the son was the acting executor. In 1789, the bill was filed by T. Butler to have the will established; and the usual decree was made. Upon the accounts it appeared, that the personal estate of G. Butler, the elder, had been applied by the executor in discharge of the mortgage to Barnard; and the question was, whether payment of that mortgage out of the personal estate of the testator could be supported. The Master of the Rolls said, he could not distinguish this case from *Tweddell v. Tweddell*. If that case and the others upon which it was determined, were out of the way, and he was called upon to decide this point for the first time, perhaps he might have been of another opinion; but he collected from those decisions, that if a man purchases an estate subject to a charge, and does no more than covenant with the vendor, that he shall be indemnified, it is not his own debt, to be paid out of his personal estate; but it remains a charge upon the estate or rather a debt of his in respect of the estate only; and if nothing more has been done to take it upon himself, the debt must be paid out of that estate and not out of his personal estate. The decree was accordingly.

A. mortgages to B., and sells equity of redemption to C., subject to mortgage. C. dies. Land, first fund for payment of mortgage.

Rule as to appropriation of debt on purchase of estate subject to mortgage.

creates term of
other lands for
payment of his
debts. Devisee
takes cum
onere.

charges a specific part of his property with the payment of debts.

[924]

Thus (k), where a leasehold estate [held of the manor of East and West Deeping, by lease from the Crown] had been mortgaged by the testator's father to N. for 6500*l.* and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to H., who advanced to him a farther sum of 100*l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows: "I give and devise to A. and B., their executors, administrators and assigns, all those my manors, lands, &c. in L., to have and to hold to them, from the time of my decease, for the term of ninety-nine years, upon the trusts herein after mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body, to the plaintiff for life, remainder to his first and other sons, in strict settlement, with remainders over, and afterwards declared as follows: "I do hereby declare, that the term and estate, so as aforesaid limited to them the said A. and B., &c. is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust, that they the said A. and B., &c. shall, out of the rents and profits, or by mortgage, assignment or demise, of all or any part of my before-mentioned manors, &c. or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient *to pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs, &c. the said term shall cease and determine." He then devised as follows: "I give and devise to my brother M. B. his executors and administrators, all that the manor of East and West Deeping, holden by lease from the Crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon to N. for 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the ap-

[925]

(k) *Ancaster v. Mayer*, 1 Bro. C. C. 454, [fully acquiesced in by Lord Alvanley, *antea*, 899.—*Ed.*]

purtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations of this my will." And towards the end of his will he devised as follows: "*Item, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever, unto my said brother M. B., if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will,*" &c. M. B. died in the life-time of the testator, and the plaintiff became entitled under the limitations in the will to the real estate. And one question was, whether the term bequeathed by the testator for the payment of debts was liable to discharge the mortgage debt on the leasehold estate? *Et per curiam*, With respect to the leasehold estate, *the charge under which it came to the testator was prior to his purchasing it, [or rather its devolving upon him], and inherent in the estate,* and the estate itself was left liable to answer it, and neither the personal estate, nor real estate, ought to be charged with that debt; for when a man purchased an equity of redemption, *subject to incumbrances, that should be a real incumbrance following the land, and not a personal one.* And the difference between an estate descended and one purchased was nothing, unless the circumstance of purchasing created the difference, but *that afforded no argument.* The question then was, whether assigning the mortgage from N. to H. and covenanting for payment of debts, altered the case, and made it the debt of the testator? and it was clear that it did not; for although where a man transferred a mortgage, and *covenanted for the payment of the debt, according to the rule of law, he made it his own debt, and made himself liable to be sued upon that covenant; yet the case of Evelyn v. Evelyn had decided (1), that though he might be at law liable, yet while there were real assets sufficient for the payment of the incumbrance, they should be applied for that purpose; and it was to be understood, with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own (w).*

[926]

Effect of purchasers covenant to pay money.

(1) *Infra*, [930, et vide S. L. 928.—*Ed.*]

(W) The land in these cases is considered the principal, and the covenant to pay only a collateral security; and the personal estate of the covenantor has the same equity to be reimbursed out of the land, as the land is en-

Covenant to pay money, only collateral security.

[927]

Purchaser of encumbered estate on farther advance charges other lands. Principal estate still primarily liable.

Another question in the preceding case was, whether, when the testator mortgaged an estate *of his own* as an *ulterior* security, that circumstance would create a difference? and it was held that it would not; for nothing made it his debt so effectually as the covenant to pay; for it did not create the debt, but only operated as collateral to the debt (m). A man mortgaged his estate without covenant, yet because the money was borrowed, the mortgagee became a simple contract creditor, and in that case the mortgage was a collateral security; and if there were a *bond* or a *covenant*, then there was a *collateral* security to a *higher species*, but no higher by means of the mortgage merely; therefore having security amounted to nothing (x).

(m) Et vide *Hamilton v. Worley*, 2 Ves. jun. 62, [S. C. 4 Bro. C. C. 199.—Ed.]

titled to when it is pledged as a collateral security. Butl. Co. Litt. 208. b. n. (1). s. 2. If a grandfather mortgages his estate, and covenants to pay the mortgage money, and the land descends to his son, who dies without paying off the mortgage, leaving a personal estate and a son; the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him, and so his personal estate derived no advantage from it. *Cope v. Cope*, 2 Salk. 450. S. C. 1 Eq. Ca. Abr. 270, pl. 3. 2 Cru. Dig. 182. 2d edit. But if the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted those assets to his own use, there an equal portion of the father's personal estate would have been liable to the payment of the grandfather's debts, and the grandson could in such case have come upon the father's executors to exonerate the mortgage out of the father's personal estate. Gilb. Lex. Præt. 315; and see *Scott v. Beacher*, 5 Madd. 96. S. C. infra, 951, last case in 2d sec. of note there. As to exoneration, when the mortgage is between tenant for life and a remainder-man, see postea, 934.

(X) It should in this place be observed, that without a bond or covenant, in which the heir is named, the mortgagee will have no claim on the real assets of the mortgagor. Thus in a MS. case mentioned by Mr. Cruise in the 2d edition of his digest on the law of real property, 2d vol. p. 163, a father and son joined in a mortgage of the father's estate; the father received the money, and the son conveyed in consideration of ten shillings. There was no covenant in the mortgage deed for payment of the money. The bill was brought to make both the real and personal assets of the father and son liable to the mortgage debt. The estate mortgaged being subject to prior incumbrances, Lord Hardwicke said, it had been determined that the personal assets were liable, though there were no covenant in the deed for payment of the money, because there was a debt contracted by the borrowing [see antea, 804]. This demand went a step farther, and sought to charge the real assets of the father in the hands of the son, which were not liable in the hands of the heir, even by a bond or covenant of his ancestor, unless the heir was specially named. As to the son, his assets were no way liable, for he conveyed only in consideration of ten shillings, and had no part of the money, consequently was no debtor; and neither his real nor personal assets were bound. *Lloyd v. Thursby*, MS. 1743. 2 Cru. Dig. 163. The same principle seems to have been hinted at by the Lord Chancellor in *Aldrich v. Cooper*, 8 Ves. 394, when he enquired upon what ground the court said, in given cases, that simple contract debts should be paid out of the real estate? Not upon the ground of assets, he added, but upon this; that not every creditor having a pledge of land, but a specialty creditor had a double fund to resort to. There might be a mortgage, for instance, where the instrument in none of its parts or obligations would

Without covenant or bond wherein heir is named, mortgagee has no claim on real assets of mortgagor.

Again, where *L. (n)*, being seised in fee by *descent* of an estate at *C.*, and other real estates both freehold and copyhold, by his will devised the estate at *C.*, which was subject to a mortgage for 1500*l.* contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate (except 300*l.* due on bond, which was originally part of his wife's fortune, and specifically bequeathed to her by the will), with his debts and legacies, and devised the residue of his real estate in trust for his brother *B.* in strict settlement, subject to a charge of 100*l.* a year to his wife upon the copyhold estate; and made his wife executrix: The question was, whether, under this will, the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the 1500*l.* And it was held by Lord Thurlow, that it should not; but that the same should come out of the estate originally liable to it (*o*). And this decree was afterwards affirmed in the House of Lords.

Estate descends on L. in fee, subject to a mortgage. He by will charges his real and personal estate with debts and legacies, mortgage to be paid out of real estate encumbered therewith.

[928]

And here we must remark, that even a personal covenant with the mortgagee, to pay mortgage money, will not make the personal assets of the covenantor liable in equity for it, where the money was originally advanced to another person, and not to the covenantor; for the Court will always take into consideration whose debt it is, and make the personal estate benefited by the loan, liable in the first instance, and not the security.

Personal assets not affected by purchaser's covenant with mortgagee to pay money.

[929]

Thus, where Sir Edward Bagot (*p*) married the daughter and heir of Sir Thomas Wagstaff, and for raising part of Miss Wagstaff's portion, Sir Thomas mortgaged part of his estate for 3500*l.* and then died, leaving Lady Bagot, his daughter and heir. Lady Bagot afterwards joined with her husband, Sir Edward, in a deed and fine, whereby she settled her estate on her husband and herself, and the heirs male of the body of her husband. The mortgagee wanting his money, Sir Edward

Covenant on transfer of mortgage does not alter nature of debt, or liability of funds.

(*a*) *Lawson v. Hudson*, 1 Bro. C. C. 58, [affirmed on appeal, 7 Bro. P. C. 511. Sib. 424. 8vo. ed. 511, et vide *Butler v. Butler*, 5 Ves. 534, cited antea, p. 863, of this edition, n. (T), where the personal estate was also charged with debts.—*Ed.*]

(*o*) Vide 7 Bro. P. C. 511, [fo. ed. and 3 ib. 424, 8vo. ed.—*Ed.*]

(*p*) *Bagot v. Oughton*, 1 P. Wms. 347, [S. C. antea, 728, of this edition, n. (Y), and see *Leman v. Newnham*, 1 Ves. 51, and antea, 842.—*Ed.*]

affect the heir; though the mortgagee had a pledge of the land it was not as assets, or as a *specialty creditor*, that he could touch the land; but if he had a bond, or a covenant were inserted in the deed, then he would be a specialty creditor; whose demand after the death of the mortgagor would affect the heir. A mortgage however is in general considered as in the nature of a specialty debt, see antea, 780, of this edition.

joined in an assignment of the mortgage, and covenanted that he or his wife, or one of them, would pay it. Then Sir Edward died, leaving Sir Walter his son by his wife; his lady afterwards married with the defendant Colonel Oughton, and died. And the question being, whether, by reason of the covenant from Sir Edward Bagot for the payment of this 3500*l*. mortgage money, his personal estate should be liable to pay the same? It was held, that this covenant by Sir Edward would not make his personal estate liable to go in ease of the mortgaged premises; for the debt being originally Sir Thomas Wagstaff's, and continuing to be so, the covenant upon transferring was only as an additional security, for the satisfaction of the lender, and not intended to alter the nature of the debt.

[930]

Covenant for quiet enjoyment free from incumbrances, no exemption of land from payment of any incumbrance.

It follows from this principle, that the general covenant in mortgage deeds, for quiet enjoyment, free from incumbrances without excepting incumbrances—does not discharge the land from such incumbrances, so as to throw them on the mortgagor's personal estate; it merely subjects the general assets of the mortgagor to any deficiency in the security that may be occasioned by any incumbrances whatsoever, without any supposition of discharging the *lands* from such incumbrances, but merely of indemnifying the mortgagee against them.

Mortgage by tenant for life under power. Remainder-man must take estate cum onere; and covenant, by intervening remainder-man to pay money, immaterial (Y).

[931]

And the law will be the same, if money be borrowed on mortgage by virtue of a power to charge an estate; for in such case, the heir takes the land *cum onere*. Therefore, where George Evelyn (*q*), the defendant's father, and grandfather to the plaintiffs, had three sons, John, George, and the defendant Edward Evelyn; George, the father (being tenant for life, remainder to his eldest son John, in tail male, of part of the premises), together with his eldest son John, on the 20th October, 1698, by deed and recovery, settled certain estates in strict settlement, with a power to George, the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l*., George, the father, in pursuance of the power, mortgaged

(*q*) *Evelyn v. Evelyn*, 2 P. Wms. 659. S. C. Fitzgib. 131. Sel. Ch. Ca. 80, [W. Kel. 19, et vide antea, 92,

of this edition, where this case is further stated as to other points.—*Ed.*]

(Y) As to exoneration, when the mortgage is made by a tenant for life and the remainder-man, see postea, 954, in notis.

part of the said land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir Thomas Pope Blunt, with a covenant, from George Evelyn, the son, for payment of the mortgage-money, and, on the same assignment, Sir Thomas, the mortgagee, covenanted to re-assign to George Evelyn, the son. Afterwards George Evelyn, the father, died; then John Evelyn, the eldest son, died without issue, upon which George, the second son, entered upon the premises comprised in the settlement, and died, intestate, leaving the defendant, Mary, his widow, and three daughters. Then Edward Evelyn and his son (the next remainder-man in tail) instituted a suit against Mary Evelyn, (who afterwards married to Governor Bohun), and who was the administratrix of her former husband, George Evelyn, the son, praying that the personal estate of her late husband should be applied towards paying off the mortgage of 1500*l.* and in exoneration of the real estates. But it was held by the Lord Chancellor, assisted by the Lord Chief Justice Raymond, and the Master of the Rolls, that the personal estate of the son should not be applied to pay off this mortgage, made by the father; because the charge was made by the father in pursuance of the power contained in the settlement; and as he had such power, the defendant Edward must be contented to take such land *cum onere*; and notwithstanding that the son did afterwards, on the assignment to Sir Thomas Blunt, covenant to pay the mortgage money, yet, since the land was the original debtor, this covenant from the son would be considered *only*, as a security for the land.

[932]

The ground of these determinations is, that, in such cases, the covenant is considered in equity as a mere collateral security, not to be resorted to, unless the principal security, which is the land, fails. For the landholder, in truth, enters into such covenant, relying upon the land enabling him to discharge it; and the money raised does not *increase* his personal estate, but is to exonerate the rest of the real estate.

In equity, covenant to pay money, can be resorted to only in case land fails.

And therefore, in the case of *The Earl and Countess of Coventry* (r), where Gilbert, the late Earl of Coventry, on his marriage with the daughter of Sir Strensham Masters (the Earl being but tenant for life, with a power of making a

[933]

Performance of covenant to execute power of jointuring decreed against remainder-man, in exoneration of personal estate of tenant for life (z).

(r) *Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 222. S. C. Stra. 596.

(Z) In *Wilson v. Darlington*, 1 Cox 174, the Master of the Rolls said, it was perfectly clear, that where a debt exists, and the real estate is charged

Benefit under power always

jointure of lands, not exceeding 500*l.* *per annum*, on any wife he should marry), covenanted, in consideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwise, settle 500*l.* *per annum* on his wife for her jointure, and it being in proof, that the late Earl directed his steward to look over the rent-rolls, for a fit part of the estate to make good the jointure, and that afterwards the jointure deed was ingrossed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* should be settled, and the covenant not made good out of the *personal estate*.

Performance of articles to settle lands decreed in exoneration of personal estate of covenantor.

[934]

And so in the case of *Edwards v. Freeman*(s), though the wife's jointure, and the daughter's portion, were secured by articles, which were never completed by a settlement, yet those articles being to settle lands, and the covenantor leaving lands sufficient to answer them, it was decreed, that the daughter's portion should be raised out of the lands, and that the personal estate of Mr. Freeman, the covenantor, should not be applied in exoneration thereof. But it is to be observed, that in the latter case, particular lands were agreed to be settled, and consequently, that the covenant was a lien upon those lands (A).

(s) 2 P. Wms. 435.

a charge on land in first instance.

with the payment of it, nevertheless the personal estate shall be the primary fund to be resorted to. On the other hand it was equally clear that where a power of charging a real estate is created, and the party does charge it, not in satisfaction of any existing debt, but in favour of a particular person, the real estate must be resorted to in the first instance. Et vide the next note, for further on this subject.

Creation of term to raise portions, an exemption of personal estate.

(A) Under this head it may be in order to introduce the case of *Walker v. Pink*, July, 1736, cited 1 Cox Ca. Ch. 5. A. devised all his goods, chattels, and personal estate (his debts and legacies being first paid) to his son, and appointed four executors; he then devised to his executors, his manor of B. for ninety-nine years, in trust, that out of the rents and profits, or by mortgage or sale, they should raise (inter alia) 4000*l.* for the portion of one of his daughters; after payment, the term to determine; and what remained after satisfying the said 4000*l.* he directed to be paid to his son; and if his daughter died before age or marriage, he bequeathed the money [the 4000*l.*] to such persons as would be entitled to the reversion or remainder of the lands; and for better raising the said portion, the testator appointed his executors to receive the rents and profits of his said estate. Upon this it was held, that the personal estate was not first chargeable with the sum of 4000*l.* 1 Cox 5. So if a person makes a settlement securing a jointure, portion, or legacy, though there be a covenant to pay, yet must the person entitled to the jointure or portion, come against the land first. *Lacy v. Gardener*, Bunb. 137, et vide *Lanoy v. Athol*, 9 Mod. 398, and preceding note. It is also observable that after the death of the settlor, the remainderman or heir can claim no right to have the real estate disencumbered out of the personal fund. 2 Atk. 413.

And upon the same principle, viz. that the primary fund benefited, ought in conscience to exonerate the auxiliary fund, if the funds in question stand in those relative circumstances; where the real estate of one person is made surety for the personal contract of another, the personal property of the latter shall exonerate the real property of the former, as between themselves, although the creditor may resort to either fund (c). The cases of *Lord Huntingdon v. The Countess of Huntingdon*, and *Pocock v. Lee* (t), stand on this ground.

Principle that fund benefited should exonerate auxiliary fund applies to principal and surety (B).

A court of equity will do its utmost to fix the burthen, where, in conscience, it ought to fall on all the circumstances of the case.

[935]
Debt fixed where it ought to fall.

Thus, where Sir John Napper's estate was in mortgage (u), and he died, leaving Sir Theophilus his heir, who, upon his intermarriage with Lady Effingham, settled a jointure upon her, and covenanted to pay his father's debts, and then died,

Estate conveyed in trust to pay A's debts. Personal estate of his heir (who sold estate) liable to A's mortgages.

(t) Supra, 756. 761.

(u) *Napper v. Lady Effingham*, Fitzgib. 142. 144, [S. C. cited 2 P.

Wms. 664. 3 Bro. P. C. 1. nomine *Effingham v. Nappier*; see also postea, 1058.—Ed.]

(B) If therefore a tenant in tail in remainder joins in a mortgage and bond with his brother, who is the tenant in tail in possession, and who receives the money, the tenant in tail in remainder will be deemed to be a surety only for his brother, in which case there can be no pretence to say, that the personal estate of the tenant in possession shall be exonerated from payment of the mortgage, merely because the tenant in remainder has made his estate liable as an auxiliary fund; and suppose the mortgagee had brought an action upon the bond given by the tenant in tail in remainder, and obtained judgment, as he might have done, the bond being joint and several; the tenant in remainder might have brought a bill against his brother in possession as principal, and would have had relief, although there might have been no counter bond existing between the parties, and he would have stood in the place of the creditor, and as such have been entitled to relief after the death of his brother. *Robinson v. Gee*, 1 Ves. 250. So if a father, tenant for life, borrows money, to secure which he and his son, remainder-man in fee, join in a mortgage of the inheritance, the son will be entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of his security for his (the son's) relief. *Rosse v. Stirling*, 4 Dow P. C. 442. And it should seem, from the case of *Lloyd v. Thursby*, 2 Cru. Dig. 168, 2d edit. cited antea, p. 866, of this edit. n. (X), that without an express covenant to pay, the tenant in remainder will not be chargeable to the mortgagee, either as a specialty or simple contract creditor; and we have seen, antea, p. 868, of this edit. in the text, that if a father tenant for life makes a mortgage by virtue of a power, and upon an assignment after his decease, the son covenants to pay the money, this covenant from the son will be considered only as a collateral security, the land still remaining the principal debtor. In *Gay v. Cox*, 1 Ridgw. P. C. 153, a son entitled to a remainder in tail joined his father, tenant for life, in suffering a recovery; then they executed a mortgage; the son was held not compellable to pay interest to the mortgagee during his father's life-time.

Tenant in tail in remainder joining person possession in mortgage, entitled to have estate disencumbered out of assets of latter.

(C) Thus, if A. upon a promise of re-payment by B. mortgage his estate, and B. neither joins in the mortgage nor covenants to pay; yet if B. actually had the money, A. will have a claim against B. and his assets, to have the lands disencumbered, as every surety has against his principal. *Lee v. Rourke*, Mosl. 318.

Surety.

possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the personal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed. But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable, that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law; because he was answerable for the trust estate, settled for that purpose.

Vendor has a lien on estate sold for residue of purchase-money unpaid; but if vendee sell or die, this lien ceases; yet court will sometimes restore it in favour of legatee.

[936]

Again (x), where T. M., in his life-time, agreed to purchase an estate of P. for 1200*l.*, but died before he had paid the whole purchase-money. T. M. by will, after giving a legacy of 800*l.* to his sister M., devised the estate purchased, and all his personal estate to K., and made him his executor. K. committed a *decastavit* of the personal estate and died; and the purchased estate descended upon B. K., his son and heir-at-law. P. filed a bill in equity against the representatives of the real and personal estate of T. M. and K., to be paid the remainder of the purchase-money. M., the sister and legatee of the testator, brought her cross bill, praying, that if the remainder of the purchase-money should be paid to P., out of the personal estate of T. M. and K., that she might stand in P.'s place, and be considered as having a lien upon the purchased estate for her legacy of 800*l.* *Et per curiam*, the vendor of this estate has, to be sure, a lien upon the estate he sold, for the remainder of the purchase-money; for from the time of the agreement, T. M. was a trustee, as to the money for the vendor (p). But this equity will not extend to a third person, but is only confined to the vendor and vendee, and if the vendor should exhaust the personal assets of T. M. and K., the defendant will not be entitled to stand in his place, and to come upon the purchased estate in the possession of K.'s heir. But then the heir of K. shall not avail himself of the injustice of his father, who has wasted the assets of T. M., which should have been applied in paying M.'s legacy. Therefore the

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(x) *Pollexfen v. Moore*, 3 Atk. 272.

(D) For similar law, see *Chapman v. Tanner*, 1 Vern. 267. *Green v. Smith*, 1 Atk. 573. *Walker v. Preswick*, 2 Ves. 622. *Tardiff v. Scrugham*, cited Amb. 726. *Fawell v. Hoelis*, ib. 724. *Blackburn v. Gregson*, 1 Bro. C. C. 420. *Cator v. Pcm broke*, 2 Bro. C. C. 282.

estate, which has descended from K., the executor of M., upon B. K., comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and in order to relieve M., the legatee, P. shall take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and this last fund shall be left open, that the legatee, who can at most be considered as a simple contract creditor, may have a chance of being paid out of the personal assets.

But a stranger to the original incumbrance may make his own personal estate the primary fund for the payment of it; and whether he has done so or not is a question of intention, on a review of all the circumstances of the transaction taken together, as they furnish ground to infer, that the person engaging meant to become a *principal*, or to stand as a *surety* only. The following cases will illustrate both instances:

A. purchased an estate for 90*l.*, which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor (*y*); the court admitted the rule of law above-mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to shew an intention in the vendee to make it his personal debt (*r*).

Whether purchaser of estate subject to a mortgage has made his personal property first fund for payment, a question of intention (z).

[938]

(*y*) *Parsons v. Freeman*, before Lord Hardwicke, 25th Oct. 1751. Vide 2 P. Wms. 664, note (1).

(E) The six following cases from Mr. Cox's note to P. Wms., shew that the court is not anxious to make an inference against the personal estate; for in five of these instances, the land was held primarily liable. The case before Lord Alvanley, p. 945, affords an instance the other way; and his Lordship there observes, that the court will be very slow in cases of this description, to operate the personal estate with a debt which was not originally the debtor's own, but which he took with the land.

(F) The words not appearing on the report there is no clue to judge of the intention, and consequently little in this case to render it applicable to subsequent occurrences. Mr. Ambler, in his report, p. 115, states Lord Hardwicke's judgment in these words:—"If the ancestor has done no act to charge himself personally, the heir at law must take the estate *cum onere*; so if one purchase the equity of redemption with usual covenants to pay off the mortgage, I know of no determination upon such a case, but am inclined to think the heir could not come to have the estate exonerated. [*Sed quære de hoc*, unless the mortgagee be a party to the conveyance, and the old mortgage is vacated and a new term limited by the conveyance]. That is not the present case, which is an agreement with the vendor for purchase of an estate for a gross sum of 90*l.* to be paid 86*l.* of it to the mortgagee, and 4*l.* to the mortgagor. The question therefore is, whether the heir at law can come into this court, and have the estate exonerated by the personal estate? I am of opinion he may, for two reasons; 1st. Because it is an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. This

Agreement that mortgage shall be paid out of purchase money makes purchaser's personal estate primarily liable.

Husband on further advance from mortgagee of wife's estate covenants to pay whole sum, his assets not liable to exonerate land; because it was afterwards settled, subject to the mortgage (G).

But (z) where N. was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans waste*, remainder in like manner to the wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband

(z) *Lewis v. Nangle*, before Lord Hardwicke, 7th Nov. 1752, [1 Cox, C. C. 240, S. C. Amb. 150, but better reported in Mr. Cox's note to] 2 P. Wms. 664, n. 1. Et vide 1 Ves. jun. 187. This case is considered

by Lord Camden in *Kinnoul v. Money*, as standing upon special circumstances and not on the general principle. See also *supra*, [727-728, of this edition.—*Ed.*]

If mortgage forms part of price of estate it becomes purchaser's personal debt.

is as strong a case as can well come before the court; and, 2d. because it being agreed to be part of the purchase-money, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed; therefore decree" as above.

Hence we may infer, that if on the purchase of an estate, which is in mortgage, it be agreed that the mortgagee shall be paid off out of the purchase-money, and that the mortgagee shall join in the assurance to the purchaser, and before the contract is completed the purchaser dies, his personal estate will be the fund primarily liable to discharge the mortgage, for it is in fact nothing more than the common case of a contract to buy an estate, and a death of the vendee before the purchase-money paid, where it is acknowledged the heir is entitled to have the purchase-money paid out of the personal estate of his ancestor. *Bradshaw v. Outram*, 13 Ves. 236. But a case in the House of Lords carried this point a step further, and decided that if on the deed of conveyance there be an acknowledgment signed by the purchaser, that part of the purchase-money is retained by him for the purpose of discharging the mortgage, then his personal estate will be the fund whereon the debt must ultimately fall; for, indeed, it is the fund benefited by not having paid the full purchase-money for the estate.

Indorsement on conveyance that part of purchase money is retained to pay mortgage, an appropriation of mortgage to purchaser's own use.

Thus in *Belvedere v. Rochfort*, 6 Bro. P. C. 520, Lord Chief Baron Rochfort having agreed with one Hughes for the purchase of an estate which was in mortgage for 900*l.*, Hughes, by lease and release, in consideration of the 900*l.* conveyed the premises to the Chief Baron and his heirs, subject to the said mortgage, which the Chief Baron agreed to pay. On the back of the conveyance was an indorsement, assigned by Hughes, acknowledging the receipt of 900*l.*, thus, "450*l.* sterling in money, on the perfection of the deed, and, 450*l.* allowed on account of the mortgage." The Chief Baron lived twenty years after this purchase, but never paid off the mortgage. By his will he gave the residue of his personal estate, *after payment of all his just debts*, and also all his lands, tenements, and hereditaments, not by his will disposed of, unto his son and heir George Rochfort, his heirs and assigns for ever; and appointed him sole executor. After a lapse of many years, and after the death of George Rochfort the son, the mortgaged estate which was given to a younger son of the Chief Baron, was decreed to be exonerated out of the personal estate of George Rochfort; for that he took his father's personal estate subject to the mortgage, the father having made the debt his own, and this decree was affirmed in parliament. 6 Bro. P. C. 537.

What if mortgage form no part of consideration.

We shall see, *postea*, 949, in *notis*, that if the mortgage-money form no part of the price of the estate, the purchaser's personal property will be exonerated from the payment of the mortgage debt. While this proposition in some measure tends to confirm the one proposed in this note, it serves also to fix a distinction which it will be well to remember.

General rule as to husband and wife.

(G) As a general rule it may be stated, that if a wife joins her husband in a mortgage of her estate for the benefit of her husband; as between the husband and wife, the mortgage will be considered a debt of

being pressed for payment of the wife's debts, and having also occasion for a farther sum of money; they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause), and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisions in the mortgage. *Subject to this mortgage*, the lands were settled to the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. N. died without issue; and the plaintiff was the devisee of the sister, who brought his bill against N.'s husband for the payment of the mortgage money. But the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life (H).

[939]

the husband's; and after the death of the husband, the wife or her real representative will be entitled to stand in the place of the mortgagee, and to have the mortgage satisfied out of her husband's assets, *antea*, 754. And it seems to be of no consequence, that it do not appear on the face of the mortgage deed, for whose use the money was borrowed, or how it was applied: parol evidence being admissible to prove the fact. *Kinnoul v. Money*, *ubi supra*, n. (2). S. C. 3 Bro. C. C. 206. 212. But if upon the face of the mortgage deed the money appears to have been borrowed for the use of the husband, which is corroborated by all other evidence, parol evidence of the wife's declaration, that the money was intended as a gift to her husband will not be allowed; so at least it has been inferred from *Clinton v. Hooper*, 1 Ves. jun. 173. S. C. 3 Bro. C. C. 201; see also 1 Rep. Bar. & Fem. 149. In this case, therefore, if the wife intends to give the money to her husband, the safer course would be to vest the estate, by fine, in trustees, upon trust, by sale or mortgage, to raise a stipulated sum for the husband's benefit. Vide 3 Bro. C. C. 213, and 1 Ves. 188.

Parol evidence admitted, when.

(H) In this case it should be observed, that there was an additional advance to the husband, and, contrary to the general rule, the personal estate was held exempt from the payment of such advance equally with the principal to which it was a further charge. In *Tankerville v. Fawcett*, 1 Cox 237. (S. C. wretchedly reported, 2 Bro. C. C. 57.) the heir procured a further advance for the purpose of paying his ancestor's debts, and executed a second mortgage, yet his personal estate was held inapplicable to the sum borrowed by him, though he had given a substantive security for the same. The case is worthy of further attention. The following is an abridged extract from Mr. Cox's statement:

Whether rule respecting original sum applies to further advances.

F. being seised of copyhold premises in D. mortgaged some part thereof to Hogg, and other part thereof to Grace Andrew. On the death of F. intestate, these copyhold premises descended, subject to the said mortgages, on his sister and heir at law, Joan, the wife of John Colville. In 1758, J. Colville and wife, surrendered the said copyhold premises to the use of a trustee in trust, for such uses as the said Joan, notwithstanding her coverture should appoint, and in default thereof in trust, for Joan Colville, her heirs, seqdels, and assigns for ever. There being considerable arrears of interest due on the said mortgages, and F. having left several debts at his death, which Colville and wife were desirous of discharging, by money to

Estate descends from A. to B. subject to mortgages. B. makes further mortgage for payment of A.'s debts. B.'s personal estate not primarily li-

Purchaser for particular purpose covenants to pay mortgage.—Debt not thereby made personal.

[940]

So, where L. had purchased several estates, subject to mortgages, with regard to one of which he entered into a covenant to pay the mortgage money, for the purpose of indemnifying a trustee (a); and as to another, which was only part of an estate subject to a mortgage, upon splitting the incumbrance,

(a) *Forrester v. Leigh*, 23d and 25th June, 1773. Vide 2 P. Wms. 664, note 1.

able; but both mortgages are charges on land in first instance.

be raised by future mortgage of these copyhold premises, they joined in borrowing a sum of money of John Andrew, to be secured by mortgage of the said premises, which, together with the two mortgages made by F. and which had since vested in the said John Andrew as assignee of the said Hogg, and as executor of Grace Andrew, amounted in the whole to 2650l.; and accordingly Colville and wife, and the trustee joined in a surrender to the use of J. Andrew and his sequels in right, with a defeazance declaring the said surrender to be made upon such uses as were declared by an indenture bearing even date therewith; by which indenture the said surrender was declared to be made in the first place for better securing to the said J. Andrew, the payment of the said sum of 2650l. and interest, and subject thereto in trust for the said J. Colville and wife, and their assigns for their lives and after the decease of the survivor of them, then in trust for the heirs, sequels in right, and assigns of the said J. Colville for ever. It appeared that the whole of the money borrowed was applied in payment of F.'s debts; that no part thereof ever came to John Colville, although he entered into no bond or covenant for the payment of it. The bill was filed by the heirs at law of John Colville [to whom the equity of redemption was limited by the last mortgage], praying that his personal estate might be applied in discharge of the mortgage. *Et per Master of the Rolls*:—"Upon the principles which are to decide this case there can be no doubt. It is quite immaterial, whether Mr. Colville had given any bond, or had covenanted to pay the money or not. It is clear on the one hand, that when the land comes to the hands of a person encumbered, his personal property will not be primarily liable, notwithstanding he may have joined in subsequent assignments, and covenanted for the further security of the money: and so on the other hand (generally speaking) whenever the personal estate has been benefited by the money secured, that shall be the fund first liable, though there be no covenant or bond. In this case the parties who enjoyed F.'s property, felt a very honourable desire to discharge his debts, and the whole money raised was so applied. Therefore, upon the general principle of the cases as between the real and personal representatives of Mr. Colville, I am of opinion, the personal estate is not to be applied in aid of the real."

If further sum borrowed be small, or if it be to pay ancestor's debts, land descended subject to mortgage, first liable to further advance. Where mortgage is to pay ancestor's debt or legacy, it is always fixed on land in preference to personal estate of heir or devisee.

From these cases, it should appear, that as to future advances, the rule which exonerates the personal fund, when an estate descends to the heir subject to a mortgage, will apply to additional loans contracted by the heir; 1st. When they are small in comparison with the original sum borrowed; and 2dly. When they are procured for the honourable purpose of discharging the ancestor's debts.

It is also observable, that the lands will be the primary fund for payment of mortgages made by the heir for the purpose of satisfying his ancestor's debts and legacies as between the heir's heir and personal representatives, though there be no previous mortgage subsisting. Therefore, where an heir, in order to raise money to discharge a legacy given by his ancestor's will, mortgaged lands descending to him from the ancestor charged with his ancestor's debts and legacies, the lands were held to have no claim to be exonerated out of the personal estate of the heir. *Hamilton v. Worley*, 2 Ves. jnn. 62, S. C. 4 Bro. C. C. 199; and see *supra*, 927; and the same rule applies to a devisee in similar circumstances; see *Perkins v. Baynton*, *infra*, 940: and though he give a bond or a promissory note to answer the debts or a legacy charged by the testator on the lands: yet in every instance, the real estate of the testator will be considered as the primary fund for payment, and the personal estate of the devisee as the collateral or auxiliary fund only. See *Basset v. Percival*, *infra*, 943, and *Mattheson v. Hardwicke*, 2 P. Wms. 665, n.

both parties covenanted to pay their respective shares, and indemnify each other; Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

But (b), where Sir W. O. by his will of the 5th February, 1799, taking notice that his daughter C. was deaf and dumb, and that J. B. had taken care of her, devised certain real and personal estate to J. B., her heirs, executors, and administrators, in trust, by sale, or felling timber, to pay all his debts, and directed that J. B. should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter; and after the death of his daughter, he gave all his real and personal estate whatsoever to J. B. in fee, and appointed her sole executrix; Sir W. O. died, March, 1740, and J. B. proved the will; Sir W. O. in his life-time mortgaged part of his estate, for securing 1500*l.* and interest, which remained a charge at his death. J. B. paid off 500*l.* part of this 1500*l.*, and afterwards borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage deed, expressly recited to have been borrowed to enable her to discharge Sir W. O.'s debts (1). J. B. afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir W. O., this cause was instituted. The cause was first heard before Lord Bathurst, on the 19th February, 1777, when the court declared that the sum of 1500*l.*, part of the 3500*l.*, was not to be considered as a debt of the said J. B., but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on rehearing, on the 13th August, 1781, that part of the decree was reversed, and instead thereof, it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir W. O., in his life-time, and remaining such at his death, was to be considered as a continued lien thereon; and that the subsequent charge made on the estate by the said J. B. being expressed in the mortgage deed to have been made for the purpose aforesaid, the same, together with the 1500*l.*, amount-

Devise of real and personal estate to A. to pay debts, residue to him in fee. Mortgage by testator after will. Further charge by A. to pay testator's debts. This, and original mortgage held a continuing charge on estate as between A.'s representatives.

[941]

[942]

(b) *Perkyns v. Baynton*, 2 P. Wms. 664, note 1.

(1) As to this part of the case, see the observations postea, 949, in *no lis.*

Estate descends on G. S. subject to a mortgage. He on transfer covenants to pay principal, and fifty-four years after agrees to raise rate of interest. Land held primary fund.

[943]

Real estate being original debtor, must bear burthen, though bond be subsequently given for debt (x).

ing in the whole to the sum of 3500*l.*, was to be considered as remaining a charge on the said estates.

So (c), where G. D. mortgaged lands to W. C., to secure payment of 5000*l.*, with interest at 5 *per cent.*, and by will of 22d of May, 1723, devised the lands to his nephew G. S., in tail male, remainder to the plaintiff in tail male, remainder over, and died in the same month. In 1725 G. S. suffered a recovery to himself in fee. The mortgagee calling for his money, W. G. agreed to advance 5000*l.* at 4 *per cent.* on assignment of the mortgage, which accordingly by indenture of 4th of June, 1725, was assigned to him, with proviso for redemption, on payment of the principal and interest at 4 *per cent.*; and G. S. for himself, his heirs, executors, and administrators, covenanted with W. G., that he, his heirs, &c. or some or one of them, would pay to W. G. the said principal and interest, in manner therein mentioned. In 1779 G. S. agreed to raise the interest to 5 *per cent.*, and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000*l.*, with interest at 5 *per cent.*; and that he, his executors, &c. would pay such interest for the same. In January, 1782, G. S. died, the interest on the mortgage being in arrear for about ten months; and the bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of G. S., or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought that the interest must follow the principal, and that the contract for the additional interest turning upon the same subject, must be in the nature of a real charge.

And where M. D.(d), by will of 15th of January, 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right

(c) *Shafto v. Shafto*, before Lord Thurlow, February, 1786, 2 P. Wms. 664, n. (1), [S. C. 1 Cox's C. C. 207.—Ed.]

(d) *Basset v. Percival*, 21st July, 1786. Note (a), 2 P. Wms. 665, [S. C. 1 Cox C. C. 268.—Ed.]

A. devises to B. charged with debts and legacies. B. pays

(K) And if a promissory note be given, still the land will be considered the primary fund, as appears by *Mattheson v. Hardwicke*, Cox's note to 2 P. Wms. 665; in which case, the testator devised an estate to A. and B. at tenants in common in fee, charged with the payment of his debts and legacies.

heirs, and gave the residue of his personal estate to his executrix C. P. The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; whilst the limitations in strict settlement subsisted, and after the death of C. P., her representative filed a bill to have a debt due to C. P., and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying, pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against M. D. and M. D. P., the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of C. P. at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to A. B., who also bought in debts to the amount of 3270*l.*, remaining due from the testator M. D., and the co-heirs gave another joint and several bond to A. B. for this sum also; so that A. B. became the sole creditor on the estate, M. D. being dead, and a bill being filed by A. B. for payment of these sums of money, the question was, whether a moiety thereof should be raised in the first place out of the personal estate of M. D., or out of the real? And his Honour was of opinion, that the real estate was the original debtor, and ought to bear the burthen.

[944]

[945]

Again, where A., and B. his wife, were seised of certain estates for their lives, with remainder to their eldest son C. in fee(e). By indentures of the 4th December, 1758, in consideration of 200*l.* stated to have been paid to A., B., and C., they mortgaged part of the premises to D. for 1000 years, and subject to that mortgage conveyed the same to such uses as C. should appoint; remainder to A. for life, remainder to C. in fee. A fine was levied, and A. and C. covenanted for payment of the mortgage money. In fact the money was borrowed and applied for the benefit of C. only. The mortgagee assigned to E., and he, in 1763, assigned to F., in which transaction

A. tenant for life, remainder to his son in fee. Son borrows money, and he and A. join in mortgage. A. after takes mortgage on himself, and indemnifies his son, who conveys to his father in fee. A. borrows more money, and makes new

(e) *Woods v. Huntingford*, 3 Ves. 128.

A. paid off all the debts, and all the legacies except one of 100*l.* for which he gave the legatee his promissory note, and died before he paid it. As to the debts and legacies actually paid by him, it was admitted on the part of his personal representatives, that he being tenant in fee of an estate subject to incumbrances, he must be presumed to have paid off those incumbrances with a view of easing the estate from them altogether; but as to the legacy of 100*l.* the promissory note was said to be only a collateral security, and that the devised estate was the primary fund for the payment of it; and his Honour was clearly of that opinion.

all legacies except one, for which he gives promissory note. Real estate devised, first liable.

mortgage for whole sum, whereby it becomes his personal debt.

[946]

all the parties again joined, and 100*l.* more was advanced; and A. and C. again covenanted for payment of the money. By deed of the 23d of February, 1767, reciting that the money had really been borrowed for the benefit of C., that he had covenanted with his father and mother to indemnify their life estates from these several mortgages, that no interest had been paid for the said 100*l.* by the said C., or K. the trustee, but all interest accrued from the mortgage to F. was still in arrear, and that C. being desirous to be discharged as well from the payment of the principal sum of 300*l.* as the arrear of interest, and all that should grow due, which arrear and growing interest, he apprehended, would with the principal sum before the death of A. and B., or before the said C. should come into possession of the mortgaged premises, amount to the value of the fee-simple thereof, had applied to A. to take upon himself the payment of the same, and to save harmless him, C.; and that in consideration thereof, he would convey and assure all his right, title, and interest in the premises to A. and his heirs; the said estates were conveyed with all the usual covenants from C. for further assurance and indemnity, and K. the trustee was directed to stand seised to the use of A., who covenanted to pay all the arrears due on the mortgage (L). A. afterwards borrowed a farther sum of 40*l.* from F., and made a new mortgage to him for the whole 340*l.*

[947]

Upon these facts the question was between the heir and the younger children, whether the mortgaged premises were to be exonerated by the personal estate of A.

His Honour said this was one of the most doubtful questions he had ever had to determine. The inference he drew from these transactions was different from that Lord Thurlow drew from the transactions in *Tweddell v. Tweddell* (f); for he was of opinion, that what had been done here was sufficient to make this the personal estate of the vendee; and he had taken great pains in order to shew that his determination did not in any degree contradict the principle there established. He should state the grounds upon which he thought this case differed from that. It might be said they were nice; but they

(f) *Supra*, 921.

(L) By this conveyance A. was in the nature of a purchaser of the estate subject to a mortgage, and, as such, his personal property was not primarily liable to the payment of the debt; but how far the indemnity to his son, and the subsequent mortgage operated to alter this arrangement of the funds, is explained by Lord Alvanley, *postea*, 951.

were the only grounds that could exist, unless you lay down at once, that the debt never can be made the personal debt of the vendee, unless by his expressly declaring that it shall be his personal debt. It came to this point only, whether *by acts* it may not be *necessarily* inferred, that he meant to make it a debt of his own. *Tweddell v. Tweddell* had many expressions in it which so fully governed his opinion, that he could not wholly omit them. Lord Thurlow began by stating, that in the first place it was absolutely necessary the executor should be liable *at law*; for if not, it was impossible there could be any equity in the heir to call upon him to pay out of the personal estate, when he would not be liable to pay at law. But though he might be liable at law, it did by no means follow, that he should be equally liable in equity, where both the personal and real estate descending upon the same person, were liable to the debt. In the known case of an obligation, binding both the heir and the executor, the heir had a right to call for exoneration out of the personal estate, which must be first applied. When, by the original contract, the personal estate was the original debtor, and the real only a collateral security, it was much stronger in favour of the heir. Then this case had arisen. A man made a contract, pledging both his real and personal estate; the latter by a general obligation; part or the whole of his real estate as a specific pledge, by way of mortgage. The estate descended upon his son as heir at law. The personal estate went to the executor; and the question was, who paid the debt? It was a mixed debt of the father, but the son's only as owner of the collateral pledge, and he had a right to call upon the personal estate. Therefore if a person succeeding to an estate of that kind, had done no act to adopt the debt and make it his personal debt, his personal estate was not liable; but if by his act he had put himself so far in the place of his ancestor as to make the debt his own, that was understood to be the same as if he was the original mortgagor: but the court had been extremely anxious not to make that inference (*ff*), unless where it was perfectly clear and obvious; therefore, though the mortgagee pressing

By acts of vendee, it may be inferred he intended to make debt his own.

[948]

The whole doctrine stated and illustrated (M).

[949]

(*ff*) [As the six preceding cases have fully proved.—*Ed.*]

(M) The distinctions here noticed are worthy of particular attention, and are referred to by the learned author, as necessary qualifications to the general position in p. 920, *antea*, of this edition; et vide 922.

Heir's covenant and bond on transfer of mortgage, no evidence of alteration of funds (N).

for his money, the heir was obliged to have a transfer of the mortgage, and, as every one knew, no assignee would take it without some personal covenant [from the heir], upon that transaction he executed a bond to the new mortgagee; if he did it only for that purpose, not meaning to make himself more

Reservation of new equity of redemption on transfer of mortgage by heir, no evidence of intention to change funds. Semb.

(N) Nor, as it should seem, is the reservation of a new equity of redemption any evidence of the heir's intention to make the debt his own. Lord Northington, however, appears to have been of a different opinion, in *Donisthorpe v. Porter*, 2 Eden 164. S. C. Amb. 602. His Lordship observes: "If an heir inherits a mortgaged estate, he makes the debt his own by covenant and bond and a new equity of redemption; his personal estate therefore is liable to pay, he has by his own act willed it so." This, it is conceived, is not enough. There must be something to raise a new contract—something to constitute a new debt to make the personal estate of the heir liable, and then without a new proviso for redemption, or, indeed, without a bond or covenant from the heir for payment of the money, the heir may exhibit an intention to make the debt his own; for the bond, proviso, and covenant are merely for the further security of the mortgagee,—a transaction, in fact, between him and the heir, whereas the parties to the exoneration are the heir's heir and personal representative. If, therefore, it appear that the heir has made a new mortgage in order only to pay off a former mortgage made by his ancestor, and the conveyance be to the mortgagee discharged of the former proviso for redemption, but subject to the proviso in such new mortgage contained, and a new proviso be inserted, then, without some other intimation of intention of transferring the debt from the real estate descended to the heir's own personal estate, neither the new proviso for redemption, nor a new bond or covenant which the mortgagee may require, or the heir voluntarily give, will of itself, make it the personal debt of the heir. See *Ancaster v. Mayer*, ubi supra, p. 923; *Perkins v. Baynton*, ubi supra, 940; and *Butler v. Butler*, 5 Ves. 538, 539; where the Master of the Rolls seemed to be of opinion, that the only way of making the heir's personal estate liable to the debt of his ancestor, was by the mortgagee's giving him a release of the debt, and then taking a new bond or a new mortgage for a sum of money equivalent to the mortgage as a loan *de novo*; and observe Lord Alvanley's decision in the principal case in the text.

This equity unaltered by renewal of lease.

These observations seem in a great measure confirmed by what fell from Lord Thurlow, in *Billinghurst v. Walker*, 2 Bro. C. C. 607. The testator in that case, devised renewable leaseholds charged with a legacy, and the devisee renewed, in which new lease he of course entered into a covenant for payment of rent and other covenants as tenant and owner of the leasehold property. Nevertheless, the renewed lease, and not the personal estate of the devisee was held to be the fund charged with the legacy, though previously to the renewal, the devisee had given a bond for payment of the legacy with interest. In the course of his judgment, Lord Thurlow remarked, that the difficulty was to distinguish the case before him from the case referred to by Mr. Mansfield. His Lordship agreed, that if the testator had shewn an intent to take the debt upon himself, it would have become his debt; but here the old security remained, and the testator merely gave a collateral security. Where a man transferred a mortgage which was not his own debt, his executing a bond as a collateral security did not vary the nature of the charge, it was only a necessary act in the transfer. [So it may be said with equal force of the new proviso for redemption.] But Lord Thurlow did not mean that such a transfer would discharge the debtor from all liability personally with his creditor, but it did not throw the charge on his personal estate. Nothing passed in the case before him to vary the charge. All the cases of sale turned upon this,—whether the charge was considered as part of the price. The mere purchase of an estate subject to charges, as an equity of redemption, did not make the personal estate of the purchaser liable to the charge, but if the charge were part of the price, then the personal estate would be liable.

Purchaser makes debt his own, when.

With respect to a purchaser, it may be inferred from this latter wording of Lord Thurlow's judgment, that if a man purchase an equity of redemp-

liable, it had been determined not to make it the personal estate of the party whose original debt it was. It had been attempted to prove that what A. had done came to that case, and that he joined only for that purpose. Most of the cases were of that kind; *Tweddell v. Tweddell* was of a different nature(g). That was not the case of a mortgaged estate descending upon the heir; but it was the purchase of an estate subject to a mortgage. There was no communication with the mortgagee; but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee. That is strongly relied on by Lord Thurlow. In commenting on *Tweddell v. Tweddell*, he does not seem to disapprove the case of *Parsons v. Freeman*(h); but seems to agree with Lord Hardwicke's reasoning, and recognizes the principle as far as it can be taken from the short note in Ambler. He intimates his doubt of *Lord Rochford v. Belvidere*(hh), upon which therefore I shall not rely, as there are many difficulties occurring against that judgment, though by so high an authority. *Tweddell v. Tweddell* amounts only to this, that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor; but merely that which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally.

[950]

Nor is purchaser's indemnity to vendor on his buying estate subject to mortgage.

(g) Supra, 921.

(h) Supra, 938.

(hh) [6 Bro. P. C. 520, S. C. antea, 874, of this edition, in notis.—Ed.]

tion subject to a mortgage, and the mortgage money forms no part of the consideration for the purchase, the mortgage will be considered a real incumbrance, merely, and not a personal debt of the purchaser. And so it will be though the purchaser covenant to pay the money and to indemnify the vendor. Vide S. L. 1 Bro. C. C. 464. *Forrester v. Leigh*, antea, 940. *Tweddell v. Tweddell*, antea, 921. *Butler v. Butler*, cited supra, of this edition, p. 863, n. (T); et vide distinction, antea, p. 873, of this edition, n. (E).

In reference to a covenant, it is clear that if the purchaser merely covenant with the vendor to pay the mortgage money, he will not be considered as having made the debt his own, for a covenant with the vendor mortgagor only, to pay the mortgage money, will not enable the mortgagee to sue the purchaser at law, though under such covenant the mortgagee might oblige the mortgagor to let him make use of his name to recover the debt. Where, however, the purchaser by any communication with the mortgagee takes upon himself the debt so as to give the mortgagee a right to sue him at law, he will be considered as having made his personal estate primarily liable and as having converted the real estate into an auxiliary fund only. See *Waring v. Ward*, 5 Ves. 670. 7 ib. 352, and *Oxford v. Rodney*, 14 ib. 417. S. C. infra, 951, in notis, which see, and particularly the distinctions there drawn.

Purchaser's covenant with vendor, no appropriation. Sed contra, if he covenant with mortgagee.

[953]

such cases the evidence is not adduced in contradiction to the written instrument, but in support and affirmation of it, according to its legal operation. Lord Talbot appears to have been clearly of opinion, that such evidence may, in such cases, be gone into, in order to ascertain the *quantum* of the debts, and the amount of the personal estate, from thence to decide on the intention of the testator, with respect to discharging the personal fund; for his Lordship observed, in the case of *Stapleton v. Colville* (i), that "what the *quantum* of the debts, or the amount of the personal estate was at the testator's death, did not appear, if it did, it would give a great light into the matter."

(i) *Supra*, 875.

*his own without
concurrence of
mortgagee in
conveyance.*

a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally." Indeed, in the very short statement of Lord Thurlow's judgment upon the re-hearing of *Tweddell v. Tweddell*, his Lordship seemed to rest entirely upon the ground, that the contract was nothing more than a contract of indemnity against the mortgage; that it was not a contract giving any direct and immediate right against the purchaser to the mortgagee; but only indemnifying the vendor, in case he should be sued by the mortgagee. The principle, Sir W. Grant further observed, was right; if that were the real result of the facts. The agreement was for a given price, 3500*l*. The purchaser had then to pay what was due to the mortgagee, and the rest to the vendor. It was very doubtful upon that, whether the mortgage was not taken as part of the price. But *Tweddell v. Tweddell* was supposed to have carried the doctrine to its extreme length. It was not therefore to be extended to a case that was fairly distinguishable from it; though it was then to be looked upon as an authority to the extent to which it went: as it was not so material, that these arbitrary rules should be the one way or the other; as that they should be fixed. 14 Ves. 417, 423.

*Effect of trans-
fer of mortgage
by heir or pur-
chaser.*

It is necessary here to remark some slight shade of difference between an heir at law and a purchaser, in regard to the effect of a transfer of a mortgage with a new proviso for redemption. In the case of an heir at law taking an estate from his ancestor subject to a mortgage, if it appears that the heir being pressed by the mortgagee for the money, joins in the transfer of a mortgage, vacates the old proviso and enters into a new one for payment of the money at a day to come, this proviso we have seen (*antea*, 949) will not make the debt his own; for the new mortgage being made only in order to pay off the old incumbrance of the ancestor, no intention can be attributed to the heir that he thereby meant to ease the land by taking the debt upon himself. So likewise, it is presumed, the law may be stated as to a purchaser. If at the time of the purchase the transaction does not warrant the conclusion that he intended to make himself personally liable, and on a transfer of the mortgage under circumstances similar to those lastly mentioned, he merely concurs in the assignment for the satisfaction of the transferee, then, notwithstanding the new proviso with different stipulations as to days and times of payment, with a covenant from the transferee that the purchaser shall enjoy till default, no sound reason presents itself to vary the law in this latter instance from that previously stated in regard to the heir. Nevertheless, if it can be inferred from the above-mentioned case of *Oxford v. Rodney*, that such would not be the law as to a purchaser, then, it is presumed, the same inference would apply in derogation of that statement with respect to the heir. Either this conclusion must follow, or the cases are at variance in principle.—Whether if the heir or purchaser on the transfer of the mortgage, were to borrow a further sum, whereby the new proviso would refer not only to different days and times of payment, but also to a different amount, an intention to make the debt a personal burthen would be in-

Lord Keeper Henley, indeed, in the case of *Stephenson v. Heathcote* (ii), expressly said, no examination could be had. But it is clear from his Lordship's observations, that he did not advert to the principle upon which Lord Talbot was of a different opinion, and which is supported by innumerable instances at law and in equity. The Lord Keeper observed, in the case of *Stephenson v. Heathcote*, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it, and that upon general principles and rules established in the cases the court could not go into the testator's circumstances, as it would establish a rule

Lord Northington's doctrine to the contrary deemed untenable.

(ii) [This case is reported by Mr. Eden, 1 vol. 38, and referred to postea, p. 956, in *notis*, on the point of parol evidence, and antea, p. 808, of this edition, n. (S), on the general subject.—Ed.]

ferred, must remain a question, as no authority occurs to balance the numerous reasons that might be advanced on either side of the argument. (See and consider *Oxford v. Rodney*, in comparison with the law, as stated in the former part of the note (F), antea, p. 873, of this edition.) If, however, A. mortgages an estate to B., and afterwards sells his equity of redemption to C., then, whether the personal estate of the purchaser shall be exempt or liable to the payment of the mortgage debt in the first instance, depends on the circumstance, whether the purchase be of the equity of redemption merely, or of the whole estate at a stipulated price out of which the mortgage money is to be paid. If the purchaser, having undertaken to pay this sum to the mortgagee, enters into a new contract with him to continue the charge on the land, and the three parties join in the assurance to the purchaser, (which, in fact, will then assume the character not only of a conveyance but also of an original mortgage,) the purchaser will by this transaction be considered as taking the *onus* of the debt on himself, and as making his personal estate primarily liable. Vide supra, p. 873, n. (E), and 882, n. (N), of this edition.

To obviate all doubt in cases involving questions of this sort, an express declaration of the intention of the parties should always be added. A form of such declaration, supposing the intention to be, to subject the personal estate of the purchaser to payment of the mortgage as the primary fund, will be added in the Appendix, No. XXXI.

In *Scott v. Beecher*, 5 Madd. Rep. 96, (the latest case to be found in the books on the subject of this chapter,) John Tyson being entitled to a copyhold estate, mortgaged the same to Mills to secure 1000*l.*, and afterwards surrendered the same to Mills and his heirs, pursuant to the covenant in the mortgage deed. Tyson died in 1814, and by his will devised all his estate and effects to his wife, Elizabeth Tyson, and in particular his copyhold estate, and appointed her executrix. On the death of Elizabeth Tyson, letters of administration of her estate were granted to the plaintiff; and the question was between him and Eliz. Tyson's heir at law, whether the mortgage was to be borne by her personal estate, or whether the copyhold descended to the heir *cum onere*. The Vice Chancellor observed, that Elizabeth was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit she might have paid off the mortgage out of the personal estate of her husband; for it was admitted, that she possessed assets sufficient to pay all the debts including the mortgage, and it might therefore be said, that she elected to continue the mortgage as a charge on her real estate. But his Honour apprehended, that this was not a case on which her personal representative was bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of John Tyson became her personal estate, but the mortgage debt of John Tyson was not her debt, and her heir, therefore, had no equity to have this mortgage paid off out of her personal estate. The bill was, consequently, dismissed with costs.

Prædictæ.

Mortgagor devises estate mortgaged to his wife, as also his personal estate, and appoints her executrix. She dying, her heir held not entitled to an exoneration out of her personal estate.

[954]

not to be adhered to (Q). Lord Talbot would not have denied this doctrine, had the equitable inference on the devise then in question been conformable to the express language of the will; but that not being the case, the real estate being expressly charged with his debts by the will, and the personal estate being only subjected thereto, by conclusion of equity, in express contradiction to the language of the instrument, another principle, equally operative as that stated by Lord Henley, intervened, *viz.* that any evidence which tends to shew that the intention is conformable to, and in corroboration of, the letter of the instrument, is admissible, and ought to be received.

*Admissibility
of parol evi-
dence support-
ed by Lady
Gaynsborough's
case (R).*

And *Lady Gaynsborough's case* appears to me to be fully in point as to the admissibility of parol evidence in such cases of the testator's declarations, respecting his personal estate and debts.

[955]

There Lord Gaynsborough devised several legacies (k), and charged them upon his Rutlandshire estate, and likewise charged his lands with the payment of his debts, and made his Lady executrix; but did not devise to her all his personal estate in express words; but it was in proof that he declared that his Lady should have his personal estate, by five witnesses of reputation; and that my Lord found fault with the will after it was writ, because the personal estate was not given to her, and that the person who writ the will, told him, that being made executrix, she had it by law, without any express gift. And it was held by the Lords Commissioners unanimously, that the Lady ought to have the personal estate exempt from debts and legacies; because the written will charged all debts and legacies upon the lands, for there were seven legacies given, and in every paragraph the conclusion was, to be paid out of his lands; and although parol proofs could not be admitted in contradiction of the will, yet when they went only in confirmation and

(k) *Lady Gaynsborough's case*, 2 Freem. 188. 247. S. C. 2 Vern. 252, 253.

(Q) The Lord Keeper's words, as stated by Mr. Eden, were these, "I have very great disinclination in admitting parol evidence to explain a will. At common law it is a rule that no parol evidence can be given of a man's intent who has put it into writing, except to explain a latent ambiguity;" citing *Lord Cheney's case*, 5 Co. 68. *Counden v. Clarke*, Hob. 32. *Jones v. Newman*, 1 W. Bl. 60. *Dowsett v. Sweet*, Amb. 175; and *Loufield v. Stoneham*, 2 Str. 1261. See 1 Eden, 89. Of the admissibility of parol evidence to explain, vary, or discharge written instruments; see 1 Phill. Evid. 566, 4th edit.

(R) This is a weak case to support the general proposition, that evidence is admissible to prove which fund the testator intended should be charged with his debts,—the next is a much stronger case, *sed vide* Lord Northington's observations hereon in the next note.

corroboration of what appeared to be the testator's intent by his written will, there they might be made use of to fortify it. And it was decreed, that the lands should stand charged with the legacies, and in case my Lady was sued for any of the debts, she was to be reimbursed out of the lands.

Upon this principle of the evidence being an affirmation of the law on the written instrument, the court declared, in the case of *Crompton v. North* (1), where the testatrix devised her lands to N. to sell and dispose of for payment of debts, and the heir brought his bill, insisting, that as to the surplus after debts paid, it belonged to him by a resulting trust being not disposed of by the will; that the estate in law being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, that she intended the surplus for the devisee, if it had been wanting and necessary (s).

Proof of parol declaration that testatrix intended surplus for devisee, admissible, if wanting.

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(1) Vide 2 Vern. 253, 254, [and argument in *Clinton v. Hooper*, 3 Bro. C. C. 205.—Ed.]

(8) In *Stephenson v. Heathcote*, 1 Eden, 40, Lord Keeper Henley said, if he could satisfy himself upon what grounds the decree in *Lady Gaynesborough's case* was founded, he should think himself bound by it; but it seemed by the petition of appeal, to have been founded in fraud in the drawer of the will, who designedly omitted to frame the will according to the instructions which he had received. His Lordship added,—In the case of resulting trusts for the benefit of the next of kin, it is not to be questioned but that executors may make use of parol evidence to rebut their equity; but the case before him did not turn upon the point of rebutting equities. The executrix brought her bill to be reimbursed what she had paid in the course of law, and the evidence afforded was to shew what was given to the executrix by the will in writing. If parol evidence were admitted in the present case, it might be admitted in every one. But without considering it as the bill of the executrix, Lord Northampton relied on this, that in all the cases in which parol evidence had been admitted, it had been for the purpose of supporting legal rights against an equitable claim. If parol evidence were to be admitted in the case before his Lordship, it would be pregnant with great mischiefs and inconveniences; and Lord Northampton thought the courts should not go a single step further than the cases had already gone. 1 Eden, 41.—Lord Hardwicke has also added his sanction to this view of the subject. In *Inchiquin v. French*, he said that it would be a dangerous thing to go into any evidence with regard to the external circumstances of the case, and to shew that the debts would be greater than the personal estate; for the words of the will, and not the circumstances of the testator, were to guide courts in their construction, 1 Cox, 9. S. C. on other points, ante, p. 807, of this edition, n. (Q). So my Lord Eldon, in *Boyle v. Blundell*, observed, that with regard to circumstances *dehors* the will, which had been sometimes called in to assist in explaining it (such as the respective amount of the real and personal estate—the greater or less degree of personal favour which the testator might be presumed to have entertained towards this or that object of his bounty, and others of that nature,) he apprehended that they ought all to be set aside in the consideration of a question depending on a will, such question being fit to be decided only by an examination of the whole will taken together. 1 Meriv. 216. And Lord Manners, in a recent case, considered it clearly established that the intention of the testator must appear from the will itself and could not be collected from extrinsic circumstances; for although Lord Talbot, in *Stapleton v. Colville*, Ca. Temp. Talb. 202, had been made to state otherwise, that had been considered as a mistake, and had been expressly denied by

Parol evidence of intention to exempt personally from debts rejected.

Lord Thurlow, in *Ancaster v. Mayer*, 1 Bro. C. C. 454; and Lord Alvanley, in *Brummell v. Prothero*, 3 Ves. 111, *antea*, 837, of this edition. *Aldridge v. Wallscourt*, 1 Ball & Be. 315. From the whole, therefore, we may safely conclude, that parol evidence of the testator's intention to bequeath his personal estate exempt from the payment of debts will be rejected; et vide S. L. *antea*, 805, of this edition, n. (N).

In the conclusion of this chapter it is proposed to consider, I. The cases on marshalling or arranging assets; and II. Those concerning contribution.

Modern rule as to marshalling assets.

I. The rule in equity, as to marshalling assets in favour of simple contract creditors and legatees is this,—that when a creditor by specialty has the option of resorting to both the real and personal assets for satisfaction of his debt, and simple contract creditors or legatees have the power of resorting to the latter fund only for payment of their demands, if there be a deficiency of the personal estate to pay both of them, the court will so marshal or arrange the different estates, as to confine the specialty creditor to the real fund, if sufficient, for satisfaction of his debt, in order that the personal estate may be left free to answer the demands of the simple contract creditors or legatees; or in case the specialty creditor shall have received payment of his debt out of the personal assets, then the court, upon proper application, will permit the simple contract creditors or legatees to receive satisfaction out of the real estate to the amount of what such specialty creditor was paid out of the personal fund. But in order to enable the court to extend to simple contract creditors or legatees these advantages, the real estate must be charged with the payment of debts, or of one or more legacies, or when there is no such charge the specialty creditor must have a *lien* upon the estate, except when the owner of it is heir at law; and then, as against him, the simple contract creditors or legatees will be permitted to throw the general bond debts upon the lands, in exoneration of the personal estate. But against a devisee of the estate, it seems that there must be some such *lien* as before-mentioned, as by virtue of a mortgage, judgment, or otherwise. And it is observable, that this marshalling or arranging of the assets will be made as well against a copyhold as a freehold estate. See *Aldrich v. Cooper*, 8 Ves. 382. S. C. *antea*, 544, of this edition, n. (C). *Fortescue v. Leigh*, Amb. 174. *Attorney-General v. Tyndal*, ib. 615. S. C. 2 Eden, 207. *Hern v. Merick*, 2 Salk. 416. *Trimmer v. Bayne*, 9 Ves. 209; and *Tonlinson v. Ladbroke*, at the Rolls, after Hilary Term, 1809. *Anon.* 2 Ch. Ca. 4. *Culpepper v. Aston*, ib. 117. *Lutkins v. Leigh*, Ca. Temp. Talb. 53. *Tipping v. Tipping*, 1 P. Wms. 730.

Instances of this rule in reference to mortgagees, creditors, and legatees.

The consequence is, that if a person having two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, the court in order to relieve the second mortgagee, will direct the first to take his satisfaction out of that estate which is not in mortgage to the second mortgagee, if that be sufficient to satisfy his demand, and this, even though the estates descend to two different persons. *Lamoy v. Athol*, 2 Atk. 446. So, if there are specialty creditors, a mortgagee of freehold and copyhold must take his satisfaction out of the copyhold estate; for the specialty creditors cannot originally and of themselves resort to the copyhold lands, for they are not assets. But if the mortgagee should resort to the freehold, the creditors by specialty may stand in his place as to the copyhold estate, 8 Ves. 382; and *antea*, p. 544, of this edition, n. (C), which over-ruled *Robinson v. Tonge*, stated by Mr. Cox, in his note to 1 P. Wms. 680. And the rule would be applied, though by this means a subsequent incumbrancer might acquire a right to tack; as suppose a man to have a freehold and copyhold estate, and to mortgage both of them to A., and afterwards the freehold only, to B., and then die indebted to B. not only on mortgage but also on bond or covenant; in this case, B. would have a right to throw A. on the copyhold, being the estate to which he himself had no power to resort, 8 Ves. 595, 596. In like manner, if a mortgagor sell part of the mortgaged estate, though, in respect of the mortgagee, he would have a right to have both parts of the estate applied to his satisfaction; yet, on a bill by him for a sale or foreclosure, the equity would be, that the estate sold should not be liable, unless the other part was not sufficient for his satisfaction. *Kirkham v. Smith*, 1 Ves. 261. And in the above-mentioned case of *Aldrich v. Cooper*, it was stated by Sir S. Romilly, *argu.* and acquiesced in by the Chancellor, that where the crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour, by letting him stand in the place of the crown

upon other funds not comprised in the mortgage, and that even in bankruptcy in a question with the general creditors. See 8 Ves. 389. 395; et vide *Sagittary v. Hyde*, 1 Vern. 455. But it may be fairly questioned, whether the benefit of this rule will be extended to a residuary legatee; and it should be remembered that when a creditor is admitted to another fund, it is only to the extent of the fund on which his claim originally attached. *Wilson v. Fielding*, 2 Vern. 763. It is merely necessary to add, that marshalling assets, in the proper acceptation of that word, forms the subject of the second chapter of lib. lii. of the Trea. on Eq. p. 286, 5th edit.

II. As to the cases on contribution, it is observable, that if mortgaged lands and unincumbered lands are devised to two different persons expressly after payment of debts, then if the lands are resorted to for payment of the mortgage, each estate will be liable to contribute proportionably towards the discharge thereof. *Carter v. Barnardiston*, 1 P. Wms. 504; and see 2 Bro. P. C. 1. So, in another case, where by settlement two estates, one in Norfolk, and the other in Suffolk, were subjected to the raising of a portion of 2000*l.* to a daughter, by a term of 500 years, to commence after the respective deceases of two several lives; one life upon the Suffolk estate, and the other upon the Norfolk estate, and the life on the Suffolk estate first fell in; the daughter brought her bill for the 2000*l.*, which J. S., to whom that estate was limited, paid. Afterwards the life on the Norfolk estate fell in; and the fee simple thereof descended to the daughter: and it was decreed that J. S., who had paid the portion, should have contribution out of the Norfolk estate, in proportion to its value. But with this, that the term being to commence and take place as the former estates fell in, and the lives upon the Suffolk estate first dying; in adjusting what proportion each estate should pay, the Suffolk estate was to be valued as an estate in possession, and the other as an estate in reversion; and the value of the term on each estate was to be fixed by what it would be worth if sold. *Haveningham v. same*, 2 Vern. 355. S. C. 1 Eq. Ca. Abr. 117, pl. 5. The recent case of *Aldrich v. Cooper*, 8 Ves. 382. 384, affords this additional remark, that if freehold and copyhold lands are mortgaged together, and, upon the death of the mortgagor, one estate descends to his heir at law, and the other to a different person, being his customary heir, and the lands are resorted to for payment of the money, a value must be set upon each estate, and then each must bear its proportion of the charge. And if the mortgage deed says, that "for better securing the mortgage money, the mortgagor covenants to surrender, &c." yet must the copyhold contribute in proportion; for the words "for better securing the payment" were not thrown in for the purpose of making the freehold estate first applicable, but were the common form of a mortgage of freehold and copyhold estates, in order to save the fine on admission to the latter.

Devise, after payment of debts, of mortgaged estate to A. and of another estate to B. both estates must contribute equally towards discharge of mortgage.

So where there is a mortgage of freehold and copyhold lands to secure same debt, though latter be but for better security.

CAP. XIX.

[957] OF THE PAYMENT OF INTEREST (A) OF MONEY LENT
ON MORTGAGE, &c. (B).

Interest reserved or taken above 5 per cent. renders security void.

BY the 12 Ann. stat. 2. c. 16. s. 1, all bonds and assurances for the payment of any principal money to be lent upon usury, whereupon there shall be reserved, or *taken*, above five pounds in the hundred for a year, are declared utterly void (c).

Interest defined.

(A) Interest is defined by Dr. Adam Smith, to be the compensation which the borrower pays to the lender, for the profit which he has an opportunity of making by use of the money; part of that profit naturally belonging to the borrower, who runs the risk and takes the trouble of employing it, and part to the lender, who affords him the opportunity of making this profit. See 1 Smith's Wea. Na. lib. 1. c. 6, p. 70, edit. 1819.

Contents of chapter.

(B) As well as this chapter can be reduced to a systematic arrangement, it treats, 1st. Of the existing statute of Usury; 2d. Of interest on securities of Irish and colonial property, from 958 to 960; 3d. Of agreements in variation of interest on punctual or irregular payment, from 961 to 965; 4th. Of what a surety or transferee may consider principal bearing interest, from 965 to 973; 5th. Of the conversion of interest into principal, from 974 to 993, and again at p. 1007; 6th. Of the payment of interest by a tenant for life and a tenant in tail; whether such tenant in tail be infant or covert, from 993 to 1006; 7th. Of the payment of interest to scrivener having custody of security, from 1007 to 1008; 8th. Of the effect and legality of different kinds of *tenders*, from 1009 to 1018; 9th. Of varying interest by subsequent parol agreements, from 1018 to 1022; 10th. Of the apportionment of interest when a tenant for life, having to pay the same, dies in the interval of a current half year, in 1022; and, lastly, Of the admissibility of parol evidence to prove an usurious taking, in p. 1025.

Interest allowed, though not reserved.

As an elementary principle, it may be here observed, that interest will be given on a mortgage, though it be not reserved to be payable. Thus, in an *Anonymous case* in the Exchequer Chamber, interest on the sum lent was given on a deposit of deeds which was accompanied with a promise to execute a mortgage when called for. 4 Taunt. 876. In like manner, it has been holden, that interest will be due on a bond, notwithstanding it be not expressly reserved. *Farquhar v. Morrice*, 7 T. R. 124, et vide antea, p. 291, of this edition, n. (D).

Interest above 5 per cent. avoids security, and incurs penalty of treble value.

(C) The words are, that "no person or persons whatsoever shall take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of 100l. for a year, and so, after that rate, for a greater or lesser sum, or for a longer or a shorter time, and that all bonds, contracts, and assurances whatsoever, for payment of any principal, or money to be lent on usury, whereupon or whereby there shall be *reserved or taken* above the rate of five pounds in the hundred as aforesaid, shall be utterly void, and that all and every person or persons whatsoever, which shall take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest, of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money, or other thing, above the sum of five pounds for the forbearing of 100l. for a year, shall forfeit, for every such offence, the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

Upon this clause of the statute, not only mortgages, where more than 5 per cent. is reserved, will be void, but also mortgages, drawn only for 5 per cent. if the mortgagee takes above that sum (a) (D).

(a) *Adlington v. Camm*, 3 Atk. 154.

(D) The contrary doctrine was advanced by Sir Thomas Plumer, V. C. in *Jennings, ex parte*, 1 Madd. Rep. 331. His Honour held, that if usurious interest be not contracted for, the security will not be invalidated by subsequently taking usurious interest. That, Sir Thomas Plumer said, was very clear: and adduced this example:—"If a bond be given, securing money with 5 per cent. interest, and 7 per cent. is afterwards agreed to be given, that is usurious, but the bond is not invalidated, and the obligee has a right to the money secured by it with 5 per cent. interest." On this part of the case of *Jennings, ex parte*, a reasonable doubt may be entertained, 1st. Because no reference was made in that determination either to the statute of Anne or to the previously decided cases on the subject; 2d. Because those cases had before settled the question directly to the contrary; and, 3d. Because the statute itself (which must be its own expositor) definitely enacts, that the taking usurious interest shall avoid the security as part of the penalty; at least, so the writer of these notes reads the statute, and he submits that such must be its sound interpretation. Lord Hardwicke was of that opinion, when he decided the above case of *Adlington v. Camm*, and, conformably to that opinion, his Lordship added, that the usurious taking might be proved by parol. See *infra*, p. 1023. From the case of *Fisher v. Beasley*, 1 Dougl. 235, it may be inferred that Lord Mansfield entertained the same sentiments; and the taking usurious interest seems to have been considered sufficient to render the security void in *Brown v. Fulshy*, 4 Leon. 43, though it must be admitted that in both these latter instances, the securities appear to have been tainted with usurious reservations, as well as usurious takings. Nevertheless, the case of *Adlington v. Camm*, and the perspicuous wording of the statute, combine to engender a very serious doubt of the authority of this part of his Honour's judgment in *Jennings, ex parte*. The consequence also, to which such a doctrine would lead, may be urged against its adoption; for that part of the statute which establishes the penalty of treble the money taken, would virtually be evaded, if the mortgagee were allowed to recover his mortgage-money after he had incurred the forfeiture, since he would then in reality forfeit only double the amount taken, being indemnified, by receipt from the mortgagor of the money advanced, as to the other one-third.

Taking usurious interest, does not render security void. Sed qu.

Now that we are on the subject of usury, it may not be amiss to run through the leading rules on that branch of law, as far as they elucidate the object of this treatise, especially as the learned author has, in no part of his work, introduced that head, except in the above two paragraphs in the text, and in his concluding remark at the end of this chapter.

Usury is taking more than the law allows upon a loan or forbearance of a debt. *Spurrier v. Mayoss*, 1 Ves. jun. 531. To constitute usury, there must be either a direct loan, and a taking of more than legal interest for the forbearance of payment, or there must be some device for the purpose of concealing or evading the appearance of a loan, when in truth it is such. *Barclay v. Walmsley*, 4 East, 57. Thus, where A. lent B. 500*l.* and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified, and after the securities were executed, and the money paid, the parties went together to another place, where B. offered A. 50*l.* who directed him to give it to his son then present, which was accordingly done, and then B. paid interest at the rate of 5 per cent. on the 500*l.* for five years, at the end of which time an action was brought against A. for usury; it was held, that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.* and consequently the interest at the rate of 5 per cent. on the 500*l.* received within the last year, was usurious. *Sewrey v. Freeman*, 2 Bos. & P. 381. So, upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5 per cent. for which a premium

Usury defined and exemplified.

[958]
Of interest on
mortgages of
colonial pro-
perty.

It is said to have been held by Lord Hardwicke (b), that if a contract were made in England for a mortgage of a plantation in the West Indies, no more than legal interest might be paid ;

(b) *Stapleton v. Conway*, 3 Atk. 727. 1 Ves. 428. [S. L. as to wills and settlements. *Phipps v. Anglesea*, 1 P. Wms. 696. *Wallis v. Brightwell*, 2 ib. 88. *Saunders v. Drake*, 2 Atk.

465. *Pierson v. Garnet*, 2 Bro. C. C. 38. *Malcolm v. Martin*, 3 ib. 50. 2 Madd. Ch. 82, and 2 Fonbl. 433, 5th edit.—Ed.]

Usurious trans-
actions by
means of lease,
while in fact it
is a loan.

of ten guineas was paid in the first instance ; it was held, that the usury was complete upon the lender's receiving any part of the growing interest within the year ; for the party having ten guineas premium in hand, and interest accruing from day to day, when he actually received interest, as such, for half a year, he received, upon the whole amount, more than lawful interest for that time upon the sum lent. *Wade v. Wilson*, 1 East, 195.

It is immaterial in what shape the profit upon the money lent is to accrue ; it is sufficient that such profit should exceed the legal rate of interest, in order to bring the transaction within the statute. Therefore "if a man desire to borrow of me 100*l.* for a year, and I am content to let him have it for legal interest, but withal compel him to take a lease of me of a house at 60*l.* rent, which, in truth, is not worth 30*l.*, this contract is usurious." *Sanders's case*, Shep. Touch. 62. And, generally, it may be added, where a loan of money is made in consideration of a lease, and an available security is given for it, the dealing will be usurious. *Wilton v. Brown*, 1 Ball & Bea. 128. Illustrative of this doctrine, the case of *Doe v. Gooch*, (3 Barn. & Ald. 664) may be cited. There, a builder having taken ground on a building lease, at the ground rent of 108*l.*, assigned over his lease to A. for a sum considerably exceeding the then value of the premises, and at the same time took a lease from A. at the increased rent of 395*l.* and containing the same covenants for building as the original lease, together with a stipulation that he should be allowed to repurchase the lease at the same sum for which it was assigned ; the Court of King's Bench held, that under these circumstances it was properly left to the jury to say whether this was a purchase or an usurious loan, and the jury having found it to be the latter, the court refused to disturb the verdict. See the Index, tit. "Lease and Loan," for more on this subject.

Mortgagee
taking commis-
sion for his
trouble, usury.

We have seen (antea, 297, of this edition, *in notis*) that a mortgagee will be allowed all his costs and expences, but that if he (being in possession) take a commission or salary for his trouble in collecting the rents, it will be considered as a mere subterfuge for the receipt of usurious interest, and he will be liable accordingly. *Scott v. Brest*, 2 T. R. 238. But there is a case in Maule and Selwyn's Reports, which seems to account the reservation of a stipulated sum, beyond the interest for forbearance, as lawful, where it is in consideration of the performance of trusts, which are tedious and difficult ; and, therefore, though generally a mortgagee with trusts for sale in case of default, will not be allowed any sum for his trouble in attending the sale and executing the trusts, yet it is possible, that on the authority of the case alluded to, courts of law might not esteem a reservation in a mortgage deed, containing such trusts for sale, that the mortgagee shall be allowed some advantage for the extraordinary trouble which it is likely will attend the sale and execution of the trusts, to be usurious and void.

Case where
mortgagee was
allowed reserva-
tion for trouble ;
trusts being for
sale, and other-
wise responsible
and difficult.

The case in Maule and Selwyn's Rep. was this :—On a contract for the sale of timber, an indenture was executed, whereby the timber, part growing, and part felled, was assigned to the plaintiffs upon certain trusts for securing to themselves, out of the proceeds, the repayment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest thereon at 5 per cent. up to the time of payment, and the deed contained a covenant that it should be lawful for the plaintiffs to retain a further sum of 200*l.* for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expences, which they might be put to on account of the premises. Lord Ellenborough said, the question was, whether this indenture

and that a covenant, in such mortgage, for payment of 8 per cent. interest, would be within the statute of usury, notwith-

was usurious, and if it appeared on the face of it, from a fair construction of all its parts, that the 200*l.* allowed to be retained as a compensation for trouble was in reality only to be allowed in extension of the interest for the loan, it would amount to gross and indubitable usury. But, looking to the trusts of this deed, his Lordship thought there was a considerable share of trouble imposed upon those who were to carry the trusts into effect, which entitled them to some compensation, and that to a considerable amount beyond the interest reserved; and although a special provision was made for reimbursing them all costs, charges, damages, and expences which they might be put to, yet that was to be confined to expences incurred by them in the cutting down and felling the timber; which might be going on for three years, but still there might be other sources of expence incurred by them, which would not properly fall under either of those heads. For instance, a portion of the labour and time of their clerks and servants, who, probably, were persons paid by the year, would be occupied in keeping the accounts; a waste of hours would also be incurred, besides an occasional personal attendance and trouble of the plaintiffs themselves to inspect the accounts, which would only be satisfied under the 200*l.* But in order to support a charge of usury, it ought to appear clearly that the payment stipulated for, is either colourable and frivolous in its nature, or excessive in its amount. As to its being frivolous, from the observations already made, Lord Ellenborough could not say that some compensation was not due, because it would require considerable personal trouble for three years, and with respect to its being excessive, his Lordship had no scale nice enough to balance the trouble which was imposed upon the plaintiffs in carrying the deed into execution, with the amount of the compensation agreed upon, so as to convince him that it was so much beyond an equivalent as to be necessarily usurious, and without some proof of that sort (which proof laid with the party who alleged the usury), the compensation was a fair one, and the instrument valid. Grose, Le Blanc, and Bailey Justices, agreeing with his Lordship, it was adjudged, that the above transaction was not usurious. *Palmer v. Baker*, 1 Maul. & Selw. 56.

Where a mortgagee procured the mortgagor to appoint him steward of a manor, the grant of the stewardship was set aside on the ground of imposition. *Thornhill v. Evans*, 2 Atk. 330. And where there was an agreement by the borrower to allow the lender a salary as a clerk in his brewery, which would yield him more than 5 per cent. on his money, it not being intended that he should perform any services, it was admitted to be corrupt and illegal. *Wright v. Wheeler*, 1 Campb. 165, n. In all such cases, therefore, it is a mere question of fact for the jury, whether the contract was fair and honest, or whether it was intended merely as a cloak for the concealment of an usurious bargain. But if the principal money be really and *bonâ fide* hazarded, it will not be usury to take more than 5 per cent. *Wortley v. Pitt*, 1 Ves. 164. *Anderson v. Maltby*, 2 Ves. jun. 248. On this principle the common annuity transactions with agreements for repurchase, are supported.

If more than legal interest be reserved, the security will be *ipso facto* void under the statute; yet, if the lender do not receive more than legal interest, the penalty will not be incurred. Serjt. Williams's note to *Ferrall v. Sheen*, 1 Saund. 294 5. And it is observable that in *Ballard v. Oddey*, 2 Mod. 307. it was ruled, that to avoid a security by reason of usury, the contract itself must be usurious; for if the agreement of the parties be honest, but made otherwise by the mistake of a scrivener, it will not be usury; as if a mortgage be made for 100*l.* with a proviso for avoiding the same, on payment of 103*l.* at the end of the year, and no covenant be inserted for the mortgagor to take the profits in the mean time, whereby, on the face of the instrument, the mortgagee will appear to be entitled to both the interest and the profits, yet, if this were not expressed, no charge of usury would be incurred.

If a lender sell stock, and pay over the money, and take a security from the borrower, to replace the stock by a certain time, or repay the money, with such interest, in the mean time, as the stock itself would have produced, the transaction will not be usurious, though the interest exceed

Lender to have salary as steward or clerk, and perform no service, usury.

Usury a fact for jury.

Contract may be usurious, but penalty not incurred till more than 5 per cent. taken.

Taking dividend on stock not usury, when.

standing this were the rate of interest where the lands lay; [for that if the courts in England were to suffer a mortgage to be

5 per cent. *Tate v. Wellings*, 3 T. R. 531. Yet, in such case, if the choice of paying the money, or replacing the stock by the time appointed, depend on the will of the lender only, the security will be clearly void as usurious; because the lender will by that means be sure of his interest at 5 per cent. with a chance of its increase by a rise in the price of funds. *Barnard v. Young*, 17 Ves. 44. In a case where A. agreed to lend B. 1000*l.* and for that purpose sold 1000*l.* stock, which, being under par, produced only 923*l.* and afterwards lent him a further sum of 1400*l.* part of which being sold out in like manner, produced only 1132*l.* and took mortgages for two sums of 1000*l.* to 1400*l.* at 5 per cent., in the former instance, with a covenant to reduce the interest to 4 per cent. on punctual payment; in the latter case, with a power to the borrower to replace the stock within two years, it was held by Lord Northington, on a bill brought by A. for a foreclosure, (the whole money having been allowed in the account computed by the Master,) that the transaction was usurious, and that equity would relieve, though the money had been paid, and the decree of foreclosure nisi, made absolute. *Moore v. Battie*, 1 Eden, 273. S. C. Amb. 371. But it should be observed, that a creditor who takes a security for the transfer or investment in his name of a certain quantity of stock, fixing the amount of the stock by what the debt would have purchased, according to the market price of the day on which the security is taken, with such interest, in the mean time, as the stock would have yielded, if purchased, will neither be guilty of usury under the 12 Anne nor come within the prohibition of the Stock Jobbing Act of the 7 Geo. 2. c. 8. *Maddock v. Rumball*, 8 East, 304. *Sanders v. Keatish*, 8 T. R. 162. 2 Esp. 698. See further as to Stock, that title in the Index to this work.

Bankers commission, though accompanied with mortgage, not usurious.

The usage of country bankers in discounting bills of exchange, to receive over and above the common interest of 5 per cent. for the time the bills have to run, the further sum of 5*s.* per cent. on the gross sum for commission has been held to be legal. *Winch v. Fenn*, 2 T. R. 52, n. *Hannett v. Yea*, 1 Bos. & Pul. 144. *Caliot v. Walker*, 2 Anstr. 495. *Auriol v. Thomas*, 2 T. R. 52. And a mortgage taken to secure a reasonable commission beyond legal interest for extra-incidental charges, as upon agency in the remittance of bills, has also been held to be free of usury. *Baynes v. Fry*, 15 Ves. 120. So, the acceptor of a bill of exchange, dated 4th July, and due 7th September, taking a premium of six pence in the pound from the indorsee and holder, for payment of the bill on the 20th of August, before it was due, has been held not guilty of usury; there being no loan or forbearance. *Barclay v. Walmsley*, 4 East, 55.

Before mortgagor can be relieved against usurious contract, he must tender money actually advanced.

If a plaintiff in equity pray that an instrument or security given for usurious consideration, be delivered up to be cancelled, the only terms upon which equity will interpose, are the plaintiffs paying to the defendant what is really and bona fide due to him. *Scott v. Nesbitt*, 2 Bro. C. C. 649. And if the plaintiff do not make such offer by his bill, the defendant may demur; whereas if the party claiming under such instrument come into equity to render his claim available, the Court will proceed upon the letter of the statute. 1 Fonb. Trea. Eq. 23. And it is now settled, that before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced. *Fitzroy v. Guillian*, 1 T. R. 153. But the Court will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest. *Roberts v. Goff*, 4 Barn. & Ald. 92. And if a mortgagor, on an usurious contract, pay the money, he may afterwards in equity recover the surplus beyond the legal interest, though the payment were made under a decree of the Court of Chancery. *Moore v. Battie*, ubi supra. *Bosanquet v. Dashwood*, Ca. Temp. Talb. 38. *Smith v. Bromley*, Doug. 697 b.

Mortgagee's security when void, so as to extinguish his debt.

On the other hand, if an usurious security be given for a legal subsisting debt, although the security be void, the debt will not be extinguished. *Phillips v. Cochrane*, 3 Campb. 119, et vide 1 Marsh. 349, and 5 Taunt. 66. In another case it was said, that where usurious securities have been acted on, and the money partly paid by the borrower, the Court of Common

made at the interest money carried in the plantations, that method might be taken to avoid the statute of usury (E).—*Ed.*]

But now this point is settled by the 14 Geo. 3. c. 79, s. 2, whereby it is enacted, "That none of his majesty's subjects, in Great Britain, shall be subject or liable to any of the penalties or forfeitures inflicted by the 12 Ann. by receiving,

But 6 per cent. allowed on Irish and West India mortgages made in England.

Pleas will not set aside a judgment and execution but upon the terms of the defendant repaying the principal and legal interest. *Hindle v. O'Brien*, 1 Taunt. 412. And after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest, will be binding. *Barnes v. Hadley*, 2 Taunt. 184. But where a former account and usurious interest founded thereupon, had been settled, and new bills given for the balance due, this was held still unavailable as a security, even for the interest really due; *Preston v. Jackson*, 2 Stark. 237; for a substituted security generally stood in the same situation as the original. *Chapman v. Black*, 2 Barn. & Ald. 588. Nevertheless, where a promissory note was given for re-payment of a sum lent, with usurious interest, and the note, when due, was taken up, and another note substituted for it, the offence of usury was not, it was held, thereby committed, nor was the penalty incurred until the latter note were paid. *Maddeck v. Hammett*, 7 T. R. 184. And it is observable, that a *bonâ fide* debt will not be destroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler*, 1 H. Bl. 462.

In cases of bankruptcy the lender of the money upon usury can have no relief in equity under the commission, though Lord Hardwicke has said, that in his time it had often been attempted. *Skipp, Ex parte*, 2 Ves. 489. In a recent case Lord Eldon laid down these distinctions:—Suppose a mortgage contract to be usurious, the creditor coming to prove in the ordinary proceeding, every other creditor, or even the bankrupt, might present a petition, which he has a mode of verifying that is not open to him upon a bill, the court, upon his affidavit stating the usury, putting the creditor to answer, upon a principle quite different from that which obtains in a suit; for the plaintiff, in a bill, could not offer to redeem without paying what was due: but by the jurisdiction in bankruptcy upon a petition, supported by the oath of the party interested, unanswered, the security is cut down altogether; not leaving the party a creditor, even for what was actually advanced. *Benfield v. Solomons*, 9 Ves. 84. When a security is tainted with usury, the court will, in the first instance, decide upon that without directing an enquiry before the commissioners, or an issue, per Sir Thomas Plumer, V. C. in *Jennings, Ex parte*, 1 Madd. Rep. 337. For further information on the subject of usury, the reader may consult Puffendorf's Law N. & N. lib. 5. c. 7. s. 8. p. 506, Barb. ed. 1 Domat's C. L. lib. 1. tit. 6, p. 121, Strahan's ed. 1 Fonbl. Trea. Eq. 139-239, 5th ed. and the respective Treatises of Messrs. Plowden, Ord, and R. B. Comyn.

Effect of bankruptcy on usurious mortgages.

(E) But this distinction appears on the cases, that although the contract for a mortgage might be made in England, yet if the mortgage were really executed in the country where the lands lie, the local rate of interest would be allowed; see *Connor v. Bellamont*, 2 Atk. 331. *Champant v. Ranelagh*, Pr. Ch. 128. S. C. 2 Vern. 393, and *Bodily v. Bellamy*, 2 Burr. 1094. The learned author of the Treatise of Equity, thus considers the point:—"As to the measure of the computation of interest, it is to be observed, 1st. That contracts are to be adjudged according to the law of the place where such contracts are made, and therefore, in all cases, interest must be paid according to the law of the country where the debt was contracted and not according to that where the debt is sued for. So where one living in England devises a rent charge out of his estate in Ireland, it shall be reckoned according to the English value, the will being made here. So Turkish and Indian interest is allowed upon contracts made there, though both parties have been long in England. Yet it is but reasonable, where the money is to be paid here, that the party should have an allowance for the return of it." Trea. Eq. lib. v. c. 1. s. 6. See also Huber Prælect. 2 tom. lib. i. tit. 3. *de conflictu legum*.

Mortgage made in foreign country bears rate of interest allowed there.

" or taking interest for, any sum or sums of money, really and
 " *bonâ fide* lent on any mortgage, &c. of lands in Ireland, or
 " in the colonies or plantations in the West Indies, the securi-
 " ties for which are made and executed in Great Britain, so
 " as the interest, so to be received or taken, do not exceed the
 " rate of six pounds for one hundred pounds for a year." (F)

Though bond
of such prop-
erty at 6 per
cent. void.
Semb.

[959]

But it seems that this statute, being an enabling act, extends only to the particular cases therein mentioned, and does not reach any others. Now it enacts, that mortgages and other securities, respecting lands in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England; but does not mention personal contracts; if so, a bond taken together with such mortgage, reserving greater interest than is allowed by the laws of this country, will, it should seem, be void as *usurious* (G).

Stat. of Geo. 3.
rendering valid
mortgages of
Irish and colo-
nial property
at 6 per cent.
executed in
England.

(F) By the first section of this act, all securities made *previously* to the passing of the act (1774) are rendered valid, and the established rate of interest of the particular place is allowed to be taken on such securities. By the second section, all *future* securities of the like kind, and also all bonds and covenants for payment of the same monies are likewise made effectual provided the interest to be *received or taken* does not exceed 6 per cent. The third section declares, that the act shall not make valid securities, where it shall be known to the lender at the time of his advancing his money, that the loan exceeds the value of the property comprised in his mortgage. The fourth section enacts, that every person borrowing any sum under the act, exceeding the value of the property above all incumbrances at the time of such borrowing, shall forfeit treble the value of the sum borrowed, one half to the informer and the other half to the Treasurer of Greenwich Hospital. The fifth and last section provides, that all securities under the act shall be registered where the property lies, within the time limited by the laws of the place; otherwise, that the same shall be subject to the penalties of the statute of usury of the 12 Anne, unless the mortgagee shall have used his utmost endeavours to cause the same to be registered within the time limited by the act.

Statute does
not extend to
case where more
than 6 per cent.
is reserved.

This statute having made effectual all securities of Irish and Colonial property, where the interest *received or taken* does not exceed 6 per cent. it should seem to follow, that where *more than 6 per cent.* is reserved on such security, is a case without the statute, and such as must be governed by the law which existed previously to the passing of the act. The consequence is, that Lord Hardwicke's rule in *Stapilton v. Conway* still holds where the interest reserved exceeds 6 per cent., and that though such higher rate of interest may be tolerated where the lands lie, yet if the mortgage be executed in England the penalties of the act of Queen Anne will be incurred.

Bond as colla-
teral security,
good,

(G) This case is particularly excepted in the act of 14 Geo. 3. and therefore, though a bond or covenant as a substantive security whereupon interest at 6 per cent. is reserved, may be void as *usurious* (3 T. R. 425), yet such a bond or covenant when taken as a collateral security will be good; see 14 Geo. 3. c. 79. s. 2.

Though given
by third person.

It has been lately doubted, whether a bond or covenant, entered into by a third person for further securing the mortgage money, be comprehended within this latter exception of the statute. To obviate this difficulty, an act of the last session was procured, whereby all bonds and covenants which have been, or which, after the passing of the act, shall be made and executed in Great Britain, either by the person borrowing, or by any other person or persons, either residing in Great Britain or elsewhere, by way of collateral security to any mortgage, security, or

No case has, as yet, been decided on this question, in relation to a mortgage; but where a bond was given in England for 2800*l.* with a condition (c), which (after reciting an agreement made in June, 1769, between A. and B. for the purchase of an estate in St. Christopher's, by the former of the latter for 1800*l.*; and that it was agreed, *at the making of that contract, and it was part of the terms thereof*, that 1400*l.* part of it, should remain secured by a joint bond of A., and another person, to be in that behalf appointed, and who was resident in England; in consequence of which, he, together with H., became bound to B. for the 1400*l.*, with interest at 6*l. per cent.*; and also reciting that it had been since proposed and agreed between A. and D. B., son of B., then deceased, that the former bond should be cancelled, and a new bond given for the 1400*l.*, with interest at 6*l. per cent.*, agreeable to the original contract) was, that, on payment of 1400*l.* by A. or S. the co-obligor and defendant, with interest at 6*l. per cent.*, &c. the bond should be void; on a plea to an action brought thereupon, that after the 29th of September, 1714, and after the death of D. B.'s father, and before the making of this bond, it was, corruptly and against the form of the statute, agreed between D. B. and A., that the bond so entered into by A. and H. should be cancelled, and that D. B. should forbear and give farther time of payment of the sum of 1400*l.* until the 25th of June, 1789, and should for such his forbearance be paid interest on the 1400*l.* in the mean time, after the rate of 6*l.* for every 100*l.* by the year; and that for securing the payment as well of the 1400*l.* as the interest, this bond was given; with an averment that the former bond was given up to be cancelled by means, &c. the present bond was void; it was held by the Court of King's Bench, unanimously, to be void *on the ground of usury* (H).

Bond in England at 6 per cent. for purchase-money unpaid of estate in West Indies, void.

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(c) *Dewar v. Span*, 3 T. R. 425.

transfer of mortgage of lands, tenements, slaves, cattle, or other things, lying in Ireland, or any of his Majesty's colonies, are rendered as valid and effectual to all intents and purposes, as if made and executed in the country where the lands lie; and it is declared, that none of his Majesty's subjects in Great Britain shall be liable to the penalties and forfeitures of the act of Queen Anne, by receiving or taking, or having received or taken interest for monies really and *bonâ fide* advanced on any such mortgage security, bond, covenant, or transfer; so as the interest to be received or taken on such bond, covenant, or security, do not exceed 6*l. per cent. per annum*. 1 & 2 Geo. 4. c. 51.

(H) *Quare de hoc*, as the money in this case was not secured by a personal contract merely,—it was a lien on the land notwithstanding the bond, *Hearne v. Boteleers*, Cary's Rep. 461. *Harrison v. Southcoats*, 2 Ves. 389; and therefore it should seem to be a case within the statute.

[965]

mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same. Lord Chancellor Parker allowed the additional 1 per cent. reserved, as a satisfaction; saying, that though the proviso, obliging the party to pay 6 per cent. was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievable against, in case of a long arrear of interest; and that if no reservation of 6 per cent. had been made, and a great arrear of interest had incurred, the court, on such a promise, in writing, to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect. We must observe, in this case, that the *mortgagee had, originally, made himself judge* what recompence he should have, in case the agreement for payment of interest was not performed, and the *mortgagor had acquiesced* therein; and therefore there would have been no equity in the court interfering to alter it (M).

Distinction between agreements for rise and abatement of interest, stated and confirmed.

(M) The distinction here treated of, between a mortgage at 5 per cent. with a clause for reduction to four if the interest be regularly paid, and a mortgage at 4 per cent. with a clause for enlargement to five if the payment of interest be deferred, is instanced by Sir W. Blackstone as a plain positive rule of law, supportable only by the reverence which is shewn, and generally very properly shewn, to a series of former determinations, that the rules of property might be uniform and steady; 3 Bl. Com. 432. It is difficult to comprehend the reason of the distinction—the difference between the cases existing merely in expression not in substance; see *antea*, p. 901, of this edition, n.(K). In *Stanhope v. Manners*, 2 Eden, 197, the sum of 10,000*l.* was borrowed with interest at 5 per cent. The mortgage deed contained a provision, that as often as the interest should be paid half yearly on certain days therein specified, or within three months next after each of the said days respectively, the sum of 6*l.* 10*s.* should be abated from every half-year's interest, and interest after the rate of 3*l.* 15*s.* for every 100*l.* should then be accepted by the mortgagee in lieu and satisfaction of the interest agreed to be paid at 5 per cent. in manner thereinbefore mentioned. This covenant drew from Lord Northington, C. the following remarks: "It has been truly said, that the authority of this court has assumed in cases of mortgages the old physical maxim *forma dat esse*, and that if the interest once runs at the larger rate, it shall not be abated, unless you hit the bird in the eye, and pay or tender, within the precise time; that, on the other hand, if it runs at the lower rate it shall not be raised even on a gross default, though, in fact, the substantial reasonable agreement between both parties is, if you are punctual to the time agreed upon you shall pay less than if you delay and put me to an inconvenience. I believe all authorities sensibly founded, but I never heard or could myself discover, the sense of the distinction. But that is not the present case, for this is a special agreement, and words cannot be stronger to express the intent of the parties, that in every instance, when the time has been neglected the abatement shall not be accepted, and in every instance when the 3*l.* per cent. has been tendered in time that it shall be accepted; and this seems a fair circumstance attending an agreement of time, and the contrary opinion would be very dangerous, viz. that one default should run through the whole term." Lord Northington then proceeded to investigate other bearings of the case, and held on the point under considera-

One default not a forfeiture of whole covenant.

It is a rule and course of the Court of Chancery, on reference to a Master to state an account upon a mortgage (n), that all money paid as surety, shall be reckoned as principal money from the time of payment, and interest allowed thereupon accordingly (N).

All money paid by surety, bears interest.

So, likewise, the practice is (o), that if the mortgagee assign the mortgage, with the concurrence of the mortgagor, all

So of all money really paid by assignee, if mortgagor concur in transfer (o).

(n) *Morley v. Elwis*, 2 Keb. 376.
(o) *Smith v. Pemberton*, 1 Ch. Ca. 67, 68. *Ibid.* 258. [S. C. 2 Freem.

184. 1 Vern. 169. *Gladman v. Hinchman*, 2 Vern. 135. Bac. Abr. 658.—*Ed.*]

tion, that inasmuch as the first half-year's interest had not been tendered until after the expiration of the three months, but that the second half-year's interest had been tendered before the expiration of that time, that the mortgagee was only entitled to interest at 5 per cent. for the half-year which had been tendered after the stipulated period.—From this case we infer; 1st. That one default in payment of the reduced rate of interest at the specified time, will not operate as a forfeiture of the mortgagor's benefit to the covenant in future, but that if he afterwards tender the subsequent interest at the time appointed he will save the penalty for that payment; and 2d. That if interest be secured at 5 per cent. with a covenant for abatement on regular payment, the court will not relieve the mortgagor if he omits to tender the lesser rate of interest at the time agreed on, which is in direct confirmation of the case of *Jory v. Cox*, supra, 961, and of the distinction we are now considering.

In an *obiter* opinion of Lord Eldon, in *Seton v. Slade*, 7 Ves. 273, this distinction is entirely disregarded; but it should be observed, that his Lordship does not allude to the exact case, but merely adduces a general principle to prove that time is not viewed in equity as of the essence of an agreement as it is at law; so that the Court of Chancery will in given cases relieve against the penalty of a condition, if the thing agreed to be done be afterwards performed, and reparation be made to the party for any loss he might have sustained in the interval. On this view of the case, little can be inferred from his Lordship's observations decidedly hostile to the doctrine in the text (961); for it is more than probable that Lord Eldon would, on a review of the cases, rather qualify his general expressions in *Seton v. Slade*, than over-rule a doctrine which appears to have been so long and so permanently established. The following were the noble Lord's remarks: "I only say time is not regarded here as at law; as in the instance of a mortgage with interest at 5 per cent. and a condition to take four if regularly paid, or at 4 per cent. with a condition for five if not regularly paid. At law you might in that case recover the 5 per cent.; for it is the legal interest. But this court regards the 5 per cent. as a penalty for securing the four, and time is no farther of the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid, that is, by paying him interest upon the 4 per cent. as if it had been received at the time. So, in this court, before courts of law dealt with a bond under a penalty, as they do now, time was of the essence there, but this court relieved against the penalty long before a court of law, and there are many other instances." 7 Ves. 273. As to the materiality of time with respect to the performance of agreements, see *Lloyd v. Collett*, 4 Bro. C. C. 469, Mr. Sander's note to *Gibson v. Paterson*, 1 Atk. 12; and *Harrington v. Wheeler*, 4 Ves. 686.

Obiter opinion of Lord Eldon, that court will relieve, whether interest be at 5 per cent. with condition to take four, or whether it be at four with condition to have five, if not regularly paid, considered.

(N) "But *quære*, whether the rule extends to payment by a stranger, without the concurrence of the debtor?" 2 Fonbl. 438. 5th edit. If a conjecture may be hazarded where Mr. Fonblanque appears to be in doubt, it is conceived to be probable that this question would be decided in the negative.

(O) And here we may remark as a general rule, that the assignee succeeds in the place of the mortgagee, and may exercise the rights which are made

Effect of transfer.

money, really paid by the assignee, that was due to the mortgagee, shall be considered principal, and that the assignee shall have interest upon the interest *then due, and paid by him, as well as upon the principal* originally lent.

And assignment be not colourably made.

[966]

Mortgagor not bound by account between mortgagee and assignee, if no party to transfer (P).

But it is otherwise (p), if the assignee hath not paid the money, and the assignment be only colourable, in order to load the mortgagor with compound interest.

The account between the mortgagee and assignee will not conclude the mortgagor, where the latter is not party or privy to the assignment (q). Thus where (r), upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the co-heirs that were looked upon to have a right to the redemption; it was insisted, that this ought to conclude the plaintiff, who claimed as devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was over-ruled by the court.

Assignee of mortgage takes subject to account between original parties (ss).

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Another case (s), illustrative of the practice as to the inconclusiveness of the account between the mortgagee and assignee of the mortgage, occurred lately. The substance of the case was stated in the judgment which was given by Lord Loughborough, Chancellor, with which I have been favoured. His Lordship said, "the question was, whether the assignee of a mortgage had a right to be paid according to the sum appearing due on that mortgage, whatever might have been the state of accounts between the mortgagor and mortgagee. The circumstances of the case had nothing in them so particular as to vary the general question. M. had created a mortgage on

(p) 1 Ch. Ca. 68. 1 Eq. Ca. Abr. 329, pl. 1.

(q) Vide supra, 202, 4, [and the notes there, p. 152 to 154, of this edition, and infra, 1034.—Ed.]

(r) *Earl of Macclesfield v. Fitton*, 1 Vern. 168, infra, 974. 1 Ch. Ca. 68.

(s) *Matthews v. Walwyn*, Shep. and Co. Lincoln's-Inn Hall, Aug. 6th, 1798. [S. C. 4 Ves. 118, and ante, 154, of this edition.—Ed.]

(ss) [S. L. *Chambers v. Goldwin*, 9 Ves. 264.—Ed.]

over to him in the same manner as the mortgagee might have done himself before the assignment was executed. It was so in the civil law; see 1 Domat. 377; but with reference to the case in the text it should be remembered, that without the concurrence of the mortgagor an arrear of interest cannot be converted into principal, and therefore, that in all instances of transfer it is desirable (though not absolutely necessary) to make the mortgagor a party if his consent can be procured.

(P) In a recent case, Lord Eldon said, it was settled that if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee; and his Lordship thought that rightly settled. He added, that he should not have made this remark, but that he knew Lord Kenyon entertained a doubt of Lord Rosslyn's decision in the above case of *Matthews v. Walwyn*. See *Chambers v. Goldwin*, 9 Ves. 264.

Law in text confirmed.

his estate, on which S. had advanced some money as being his attorney. The purpose of creating that mortgage was, that money might be raised for the use of M. The sum that was actually paid by S. to M. did not go to the whole extent of it, because by subsequent dealings, that sum which was actually paid by S. to M. was in fact reduced. S. ought not to have made any use of that mortgage, but to have raised money on it for the use of M. But S. thought fit to make an assignment of this mortgage, and the assignees of the mortgage claimed to hold it to the full extent of the sum appearing due on the face of the mortgage deed." When this case was agitated before his Lordship, a case was referred to, in which it was supposed my Lord Thurlow had entertained, not decided, but it was intimated that he entertained an idea, that if a mortgagor had permitted the mortgage deeds, without any indorsement, to be in the possession of the mortgagee, an assignee taking under that mortgagee, might have a right to hold the mortgage to the whole extent of the sum appearing due on it against the mortgagor. It was also stated, that in practice it was supposed that persons dealing in such securities were bound to know the mortgagor, though *that* in some cases might be difficult; and that the assignee of a mortgage was bound to settle accounts, as the person would have been from whom he took the assignment.

Matthews v. Walwyn.

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"I thought it material to get such information, as one can, in inquiries of this kind, with respect to the practice; and I believe the general result is this, that persons most conversant in conveyancing hold, that it is extremely unfit, and very rash,

Assignment of mortgage should always be with mortgagor's privity (4.)

(Q. In *Williams v. Savell*, 4 Ves. 309, A. made a mortgage to B. for 500*l.* B. without the knowledge of A. assigned this mortgage with other property to C. for securing 500*l.* and interest, which assignment the persons lying in Middlesex, was duly registered. About a year after this assignment A. paid B. 200*l.* on account of the principal, and 1*l.* 2*s.* for interest due on the mortgage, the receipts for which were expressed the former, to be "in part of 500*l.* secured by mortgage," and the latter to be "for interest due at Lady Day next." A few months after, he paid to B. the further sum of 200*l.* on account of the said principal money, the receipt for which expressed that payment to be "in part of 500*l.* due upon the mortgage." B. became bankrupt, and in July, 1797, the assignees of the mortgage filed a bill for foreclosure: charging, that the assignee of the assignment was notice to the mortgagee. In September, of the same year, the money remaining due for principal and interest was tendered to the part of the defendant to the plaintiff and refused. The mortgagee by his answer, denied any notice of the assignment until the 23d of April, 1797, when he was applied to by the plaintiff's solicitor for the whole 500*l.* and interest, and he denied collusion, and proved cash from the time of the tender. Lord Mansfield decreed, that the defendant the mortgagee should be at liberty to receive upon payment of what remained due deducting the payments made to B. with 5*l.* as to the time of the tender said;

After assignment of mortgage without notice to mortgagor, payments to mortgagee void except. Registry as notice for this purpose.

*Matthews v.
Walwyn.*

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*Lunn v.
St. John.*

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and a very indifferent security, to take an assignment of a mortgage without the *privity* of the mortgagor, from whom he might learn the sum really due on it. In fact the assignments of mortgages are sometimes made without calling on the mortgagor, but in these cases the assignments are taken as the best security a man can get for a debt not very well secured, or in the course of transactions for raising money on such slender securities as they can find it. But I understand, among conveyancers, no gentleman of established practice would recommend to take as a title, and as a good title, the assignment of a mortgage, without making the mortgagor a party *privy* to that assignment, and without being *satisfied from him* of the money that is really due on the mortgage^(R). With respect to a case that was quoted, I believe, from the circumstances, of the first order, there might be some doubt expressed at the time on the point. The name of the case to which I allude is *Lunn and others, assignees of Lodge, a bankrupt, v. St. John*, and some other parties. L. granted a mortgage to P., who made an assignment of it to St. John, for a sum less in fact than the money appearing to be due on the mortgage. The case as stated was this. L. made a mortgage to P. for 2000*l.* P. being indebted to St. John in the sum of 1100*l.* assigned the mortgage to him by an indorsement, stamped and signed, but not sealed, as a further security for the repayment of the principal sum of 1100*l.* Afterwards L. and P. both became bankrupts, and L.'s assignees filed a bill to open the account alleging error, and insisting that nothing was due. It was objected that the plaintiffs must redeem St. John, who had nothing to do with the accounts between L. and P., but was a fair assignee without notice of any transactions or accounts between L. and P. The Chancellor (Lord Thurlow) referred the account to the Master, and gave him special directions to say what was due at the time of the mortgage, and also what was due on that mortgage at the time of the assignment, and what remained due on it; saving the point, how far St. John should be affected, till after the Master made that special report. It came on afterwards, on the Master's report, before

(R) But if the concurrence of the mortgagor cannot be obtained, it is highly essential to take from the mortgagee a covenant that the money alleged to be owing is really due, and to give notice of the assignment to the mortgagor with as little delay as possible; nevertheless, it is fit to apprise the student that such notice is not essential to the validity of the transfer. *Pettit v. Ellis*, 9 Vea. 563.

the Lords Commissioners, and the Master having reported that P. was indebted to L. in the sum of 7000*l.*, the order that was made by the court declared, that the assignment dated, &c. made by P. to St. John, was to be deemed null and void against the estate of L. the bankrupt; that the assignment was to be delivered up to the assignees of L. to be cancelled; that St. John also was to deliver up to the plaintiffs all deeds, papers, and writings, that came to their hands, or were within their power relating to the estate; and that St. John should re-convey to the plaintiff, the assignees of L. Therefore the final result of that case was, that nothing was due on the original mortgage, and that the two assignees of that mortgage took no benefit from it. The account was settled on the foot of the original mortgage, and the estate was re-conveyed. So far the determination of this case is a direct authority for M.

Matthews v. Walswyn.

[971]

“ The cases that have been decided, and long decided too, bear very much on this case. In Vernon, and the Precedents in Chancery, the case is now perfectly settled, that, as between mortgagee, and any person claiming under him, without the privity of the mortgagor, you cannot (s) settle the accounts. Yet if the mortgagee has been in possession, and the assignee has been in possession, the assignee is bound to settle the account of rents and profits with the mortgagee.

Mortgagee and his assignee, cannot, without mortgagor, add to what is due, settle account, or turn interest into principal.

“ On considering a little the general principle on which this court acts, with regard to mortgages, I do not feel any difficulty in deciding this point. It is true, a mortgage may be considered as the conveyance of a legal term; but then it must be apparent on the face of the title, that it is not an absolute conveyance of a term, but the conveyance of a term, or of the inheritance of the estate, as a security for a debt; and that the real transaction is an assignment for a debt from A. to B., that debt being collaterally secured by a charge on the real estate. On this principle, therefore, it is obvious, if an action was brought on the bond, in the name of the mortgagee, the mortgagor would pay no more than the sum found due on the bond; or in covenant, brought in the name of the covenantee, the accounts must be settled in that action, according to the amount of the principal money and interest. There seems to be no reason in this court, why the condition of the assignee of a

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(S) “ Add to what is due, settle the account, or turn interest into principal”—per Mr. Vesey’s report of this case, 4 Vol. 128.

mortgage should be better than it is at law, to recover that, which was transferred to him by the assignment (t).

Principal object in transfer of mortgages should be assignment of debt (T).

[973]

The principle first laid down by Lord Loughborough, in the case of *Matthews v. Shephard*, that the real transaction in the transfer of a mortgage amounts merely to an assignment of a debt, collaterally secured by a charge on the real estate, being admitted, the conclusion his Lordship drew, on general reasoning, will be found to follow, as a necessary consequence, in a court of equity; for, taking the mortgage as a debt, if it be not on a negotiable contract, it is merely a *chose* in action, for which the assignee has no remedy at law, or right to sue in his own name, and has only an *equitable* remedy, which fails when the debtor has a legal discharge, as a release upon payment of the money, or any part of it.

Whether rule as to account applies, where there is negotiable collateral security.

But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of a part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor, on liquidating the account, although he had paid it before; because the indorsee or assignee has a legal right to the note, and a legal remedy at law, which a court of equity ought not to take away from him, but to allow him the benefit of on the account.

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Interest cannot be turned into principal, with-

And here (x) we must particularly remark, that *generally* an assignment, to give title to interest on interest, must be made with the concurrence of the mortgagor; for where it is assigned

(t) *Note.* The Lord Chancellor, after delivering his judgment in this case, said, "I was referred by a note to a book, which I am not acquainted with, nor am I acquainted with its character, *Powell on Mortgages*. It is said, that in page 223 and 277, he treats this point as clear." Mr. Solicitor-General said, "Mr. Powell is a gentleman of con-

siderable practice." The author thinks it necessary to insert this note, the observation having been grossly misrepresented, in stating this case, in several daily papers.

(x) *Ashenhurst v. James*, 3 Atk. 271. [*S. L. Quarrell v. Beckford*, 1 Madd. Rep. 282, et vide an essential qualification, *postea*, 1007.—*Ed.*]

Utility of note of hand accompanying mortgage.

(T) At law, the mortgage debt being a *chose* in action, is not, in general, assignable. A power of attorney, therefore, must be given by the mortgagee to the assignee, to enable him to proceed in his name on the covenant and bond. When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest, whether, in such a case, the rule as to the mortgagee's liability would apply; for that the assignee or indorsee has a legal right in the debt and a legal remedy at law, which equity would not take from him. Hence the utility of a note of hand as a collateral security to a mortgage.

without his assent, the assignee must take it *only* upon the same terms with the assignor. out mortgagor's consent (v).

Thus (y), where the bill was to have the redemption of a mortgage of the manors of B. and S., in the county of C., which mortgage had been assigned to F., one point was, whether, there being great arrears due at the time of the assignment, which were paid by F., the money paid for interest, then in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal, in such case, unless the mortgagor had joined in the assignment; and the case of *Porter v. Hubbard* (z) was cited, where, in a like case, it was decreed that interest should be reckoned principal; but the decree was reversed in the House of Lords; because the executor of the mortgagor was no party. But the Lord Keeper said, *that pre-*

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(y) *Earl of Macclesfield v. Fitton*,
1 Vern. 168, supra, 966.

(z) 2 Ch. Rep. 86. S. C. 3 ib. 78,
[and Nels. 150.—Ed.]

(U) So in the civil law, *nullomodo usura usurarum à debitoribus exigantur* [this rule was consequently confined to the debtor himself, and did not extend to the case where a third person paid for a debtor interest to his creditor], *et veteribus quidem legibus constitutum fuerat, sed non perfectissime cautum. Si enim usuras in sortem redigere fuerat concessum, et totius summa usuras stipulari; quæ differentia erat debitoribus à quibus reverè usurarum usura exigebantur? Hoc certè erat non rebus, sed verbis tantummodo legem ponere. Quapropter hoc apertissima lege definimus, nullomodo licere cuiquam usuras præteriti temporis vel futuri in sortem redigere, et earum iterum usuras stipulari. Sed etsi hoc fuerit subsecutum, usuras quidem semper usuras manere, et nullum usurarum aliarum incrementum sentire: sorti autem antiquæ tantummodò incrementum usurarum accedere. Cod. de usur. lib. iv. tit. 32. 28.* But according to the same law the rule thus prohibiting the taking of interest on interest did not hinder a minor from exacting lawfully from his tutor or guardian, not only interest for the sums arising from the interest which the minor's debtors had paid to the guardian, but also interest on interest of sums which the said guardian might owe upon his own account to his pupil. See *Domat. C. L. 422.*

Interest on interest not allowed by Roman law, except, when.

By the law of England, compound interest is not an unlawful thing in itself, and in some particular trades it is allowed, per Lord Com. Wilson, in *Morgan v. Mather*, 2 Ves. jun. 21; but Lord Com. Eyre particularly desired it to be observed, that the court was not to be understood to have laid down any thing upon the subject of interest that had relation to mortgages, ib.; et vide infra, latter end of note to p. 991. Lord Thurlow's opinion was in favour of interest on interest; because he did not see any reason, if a man did not pay interest when he ought, why he should not pay interest for that also. But Lord Thurlow said, he found the court in a constant habit of thinking to the contrary; and therefore he was obliged to bend to authority. *Waring v. Cunliffe*, 1 Ves. jun. 99. His Lordship expressed the same opinion in *Champion Ex parte*, 3 Bro. C. C. 459.

Compound interest not unlawful in England, but disallowed in regard to mortgages.

In *Conway v. Sarinpton*, 21 Vin. Abr. 511, (S. C. ante, p. 384, of this edition, text, on other points) an equity of redemption was conveyed to A. in trust for payment of debts, and the surplus to B.; A. agreed with the mortgagee to turn interest into principal: this agreement of the trustee was held binding on B. though he was no party to it.

Agreement by trustee to turn interest into principal, binding on cestui que trust.

cedent could not weigh much with him, he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable, that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. However, his Lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one, he would follow it in this case; but no such precedent could be found.

Nor as against other incumbrancers without their consent (an); which they will be considered as giving, by confirming sale to best bidder.

[976]

Formerly said that interest should bear interest, if mortgage were forfeited.

This rule admits of distinctions in particular circumstances. Thus (a), where creditors procure a decree for sale of an estate before a Master, and one, by consent of all parties entitled to the estate (being confirmed the best bidder by authority of the court, all the incumbrancers agreeing he shall be purchaser) takes an assignment of all incumbrances; in this case he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for principal, together with interest upon the interest, their consent being the same thing, as if they had been made parties to the assignment.

It is said, that in Hilary vacation, a little before Easter Term, in the 26th and 27th Car. 2 (b), the Lord Keeper declared it should be the rule that a mortgagee, on his mortgage being forfeited, should have interest for his interest.

Thus (c), where a mortgage was made in June, 1678, for 450*l.* principal money, payable at the end of five years, and interest in the mean time half-yearly; and, about two months before the five years were expired, the mortgagee (no interest having been paid) assigned the mortgage to the defendant in consideration of 560*l.* being so much due for principal and interest; the question was, whether the interest then due should carry interest? It was objected, that the mortgagee ought not to have assigned until the five years were expired (cc); *sed non allocatur*, for the mortgage was forfeited long before, by non-payment of the interest; and the 560*l.* was decreed to be paid, with interest, from the time of the assignment.

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This rule soon laid aside, and now interest not allowed on ar-

But this rule, if ever made, seems to have been laid aside soon afterwards; for, where G. (d) in 1641, made a mortgage in fee of lands, worth about 30*l. per annum*, to C. to secure

(a) *Ashenkurst v. James*, 3 Atk. 271, *supra*, 974.

(aa) [S. L. *infra*, 978-9 and 1007.—Ed.]

(b) 1 Ch. Ca. 258.

(c) *Gladman v. Henchman*, 2 Vera. 135. Hil. 1690.

(cc) [As to this, see *antea*, p. 272, of this edition.—Ed.]

(d) *Procter v. Cowper*, Pre. Ch. 116. Trin. 1700, [et vide S. L. *antea*, 291, of this edit. n. (P), and *postea*, 992.—Ed.]

300*l.*; in 1652 the mortgagee took possession, and in 1660 devised the lands to A.; in 1680 (which was five years after the rule above-mentioned is said to have been made) the devisee brought a bill to foreclose. The wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8 *per cent.* and there had been infancies on the plaintiff's part for several years. The Master of the Rolls decreed the plaintiff to redeem, and pay 8 *per cent.* only, that being then legal interest; and said, that though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must (*dd*).

A Master's report (*e*), computing interest, makes that interest principal, and to carry interest; for a report is as the judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the parties disobedience to the court, in not complying with the time of payment, ought to subject him to interest (*x*).

Interest made principal by Master's report computing interest (w).

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(*dd*) [S. L. as to costs carrying interest, *infra*, 993.—*Ed.*]

S. C. Pre. Ch. 500. 2 Eq. Ca. Abr. 530. 9. *Cresse v. Hunter*, 2 Ves. jun. 159.

(*e*) *Bacon v. Clerk*, 1 P. Wms. 478.

(V) So interest will not be allowed on arrears of maintenance. *Mellish v. Mellish*, 14 Ves. 516. As to costs, see *postea*, p. 1068, in the text and notes.

(W) S. L. *Greenby v. Howe*, *infra*, 1007, in notes. A judgment at law will have the same effect in converting interest into principal, as a Master's report computing interest in equity. Thus, where upon the affirmation in error, in the Exchequer Chamber, of a judgment in an action on a promissory note, and also on a special agreement made by the defendant to replace stock in the funds, which had been lent him, and in the mean time to pay half-yearly sums equal to the dividends, as they accrued, the verdict comprising interest on the note, and dividends on the stock, up to the time of the verdict, and it was moved for interest (not for farther dividends) on all the capital sums recovered, up to the time of the affirmation, the motion was allowed. *Dwyer v. Gurry*, 7 Taunt. 14. But it should also be remarked, that the Court of Exchequer Chamber does not in the ordinary exercise of its discretion, give interest upon the evidence of affidavits, but only on that which appears on the record to bear interest. *Anon.* ib. 244.

Judgment at law turns interest into principal.

(X) So in *Perkins v. Baynton*, 1 Bro. C. C. 574, it was agreed, by the counsel on both sides, and by Mr. Dickens the Register, that when subsequent interest is directed to be computed, it is the course of the court, in the case of a mortgage, to compute such interest on the principal and interest reported due; but in cases of bonds or legacies, to compute it on the principal only. The ground of this practice of allowing interest on the whole sum computed due, is that the party comes for the favour of the court: he is ordered to pay a given sum on a certain day, and if he does not he is put under terms of paying what will indemnify the other party completely. But this, as before observed, is not the course of the court in reference to a bond; and, therefore, where the Master of the Rolls had allowed interest on the whole sum found due for principal and interest on a bond, the Lord Chancellor in a recent case corrected the mistake, which he said was not probably brought under the consideration of the Master of the Rolls. *Turner v. Turner*, 1 Jac. & Walk. 47.

Interest allowed on whole sum reported due on mortgages, contra on bonds and legacies.

*Provided report
be confirmed,*

But the report (f) must be confirmed; for, where A. the defendant, insisted that 800*l.* was owing to him, and, upon the Master's report, only 180*l.* appeared due; the court ordered interest for that sum, from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum.

*and estate be
sufficient to pay
all incum-
brances.*

Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report (g) (y).

*Interest not al-
lowed to carry
interest on a
suit for sale
against other
mortgagees or
bond creditors.*

And although the report *be* confirmed, yet, if the suit be for a sale, and not to foreclose, interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto.

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Thus (h), where the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest, in the first place the Master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the Master might compute subsequent interest and costs upon the sum reported due. There was not near enough arising from the sale, to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to shew a difference between the present bill and a bill of foreclosure, insisting, that, in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other creditors was concerned; therefore *it would be hard to give interest upon interest in favour of one creditor to the prejudice of the rest.* And the Lord Chancellor allowed the distinction, saying, that it would be rather

*Bill praying
sale, and bill of
foreclosure, dis-
tinguished.*

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(f) 1 P. Wms. 453. 480. *Kelly v. Lord Bellev*, 1 Bro. P. C. 202, ib. 566. 2 Ves. jun. 159. Mos. 27. *Attorney-General v. Brewer's Co.* 1 P. Wms. 376. 453. 480. 2 Eq. Ca. Abr. 530.

(g) *Neal v. Attorney-General*, Mos. 247. *Astley v. Powis*, 1 Ves. 495, [et vide infra, 980.—Ed.]

(h) *Harris v. Harris*, 3 Atk. 722.

(Y) The general rule is, that interest will be allowed on the consolidated sum, though part of it be in respect of costs (*Bickham v. Cross*, 2 Ves. 471) from the time the report is confirmed, and the principal will carry interest from the date of the report up to the time of its confirmation. *Jacob v. Suffolk*, Mosl. 27; et vide preceding note.

too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried 5 per cent. and proposed to the counsel; that, from the time of the Master's report being confirmed, it should carry only 4 per cent. in which the plaintiff acquiesced.

Where the court enlarges the time for a mortgagor (i), or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs, are lumped into one sum by a Master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum.

It seems, in general, that an account (though before a Master) against an infant, on a bill to foreclose, shall not carry interest on interest.

Interest on interest allowed, if time for redemption be enlarged by court.

Contra, on account against infant.

So, upon a bill (k) being brought, that an infant might redeem a mortgage, or be foreclosed; upon the hearing it was decreed to an account, and that the infant should pay what was reported due, unless he shewed cause to the contrary within six months after he became of age. A report was made, and confirmed, of 2600*l.* due; and, upon a subsequent order being made to compute interest from the report, the Lord Keeper doubted whether interest ought to be allowed for the interest.

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And I should apprehend that, in such case (l), generally speaking, interest upon interest ought not to be allowed against an infant; because one ground, upon which the court turns the interest into principal, is by way of inflicting punishment on the mortgagor for non-performance of his contract, which motive ought not to operate against an infant. For the same reason, on which the court indulges him with the privilege of shewing cause, after he comes of age, namely, his presumed incapacity in the management of his affairs, which discharges him from any consequences incurred by, or penalty inflicted on, the ground of negligence, operates equally against loading him with compound interest upon an account, when it may be presumed, that the like imbecility, which induces the court to indulge him with an opportunity of shewing cause against a decree of foreclosure, or other decree charging his estate, likewise occasions the non-payment of the interest (m).

Reasons for not allowing interest on interest against infant generally.

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(i) *Neal v. Attorney-General*, Mos. 246, 247, [et vide *Bickham v. Cross*, 2 Ves. 471.—Ed.]

(k) *Bennet v. Edwards*, 2 Vern. 392.

(l) Litt. sec. 402, 3, 4. *Ld. Raym.* 25. *Gilb. Ten.* 32.

(m) Et vide the case of *Sir Redmond Everard v. Eliz. Aston*, 2 Bro. P. C. 56. 12 Vin. Abr. 113. *Ca.* 47.

If infant be foreclosed nisi, this, a stronger case for not allowing interest on interest.

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But if infant be plaintiff, foot of account will bear interest.

And if the decree were, that, on non-payment of what should be reported due, the infant should be foreclosed, unless cause were shewn to the contrary within six months, &c. the case would be still stronger against allowing interest upon interest. First, because, by such decree, the mortgagee has the penalty which he annexed to the non-performance of the contract by the mortgagor, namely, the estate discharged from the condition. Secondly, because one ground upon which the court turns the interest into principal, is, as a recompence to the mortgagee for the delay he receives, by reason of the indulgence given by the court to the mortgagor, in allowing time for redemption, which reason does not apply here; as, in the case of an infant, the foreclosure takes place immediately, but subject to be opened within six months after he attains his age, if the infant's defence be mistaken, or there be any irregularity on the part of the mortgagee.

But here we must remark an exception to this rule, as to infants, where an *account and report* are taken and made, in a cause where an *infant is plaintiff*; for there the sum will bear interest from the foot of the account; nothing being more certain, or established, than that a minor is bound and concluded thereby, unless he shew fraud, or error to his prejudice; for it would be not only inequitable, but unreasonable, to take from such defendant, the *benefit* of making use of those proceedings, which he is *forced into* by the infant, and thereby to subject him to the difficulty and expence of taking a new account.

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Thus, where Thomas Odell, an infant (n), to whom the equity of redemption of a mortgage for years descended on the death of his father (who had exhibited his bill, in the Court of Exchequer in Ireland, against the mortgagee and his assignee, to redeem the premises, and for an account of the money due on the mortgage) filed his bill of revivor; the cause was heard, and the court decreed, that it should be referred to the Remembrancer to state and settle an account, who made his report, that 1883*l.* 18*s.* was due for principal *and interest*, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for farther hearing, it was decreed, that upon the mortgagor's paying the sum of 1883*l.* 18*s.* so reported due, *with interest for the same*, from the time of the report being confirmed *absolute*, the pre-

(n) *Baddam v. Odell*, an infant, and *Fitzmaurice*, his guardian, 4 Bro. P. C. 447.

mises should be re-conveyed, and all bonds and securities delivered up. *Baddam v. Odell.*

Afterwards, Odell neglecting to pay the money reported due, or any interest for the same, the mortgagee, who had likewise had a suit depending, filed an amended and supplemental bill, in order to have the benefit of the decree, by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit.

To this bill Odell put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed rather than submit thereto. Afterwards, the cause came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause, but that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the chief Remembrancer, or his deputy, to audit and state an account, between the plaintiff and defendant, on the foot of the mortgages and securities in the pleadings mentioned, in which account both parties were to have all just allowances.

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From this decree the mortgagee appealed, insisting, that the infant ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the court, and signed and inrolled; and that he ought not to be permitted to wave, or vary the same, especially when neither fraud nor error in the account were even suggested.

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And so it was adjudged, as to that point, and the decree reversed; and it was farther ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge or falsify the same; and that, in case of any surcharge, or falsification, the Remembrancer should deduct so much as ought to be deducted on account thereof; and that the Remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report*, for the sum thereby reported due, after such deductions made thereout as aforesaid.

Mortgagee threatens to enter. Agreement by infant to pay interest on arrears, binding.

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So, likewise, a distinction is made (o), where an infant concerned agrees to allow interest on interest, and a benefit accrues to him thereby, and it would be unjust to take it from the mortgagee; for, in such case, it shall be allowed; as the law, at the same time that it protects the imbecility and indiscretion of infants from injury, through their own imprudence, enables them to do binding acts for their benefit, and, without prejudice to themselves, for the benefit of others; for the end of the privilege being their protection to *that object*, all the rules, and their exceptions, must be directed; and *not* to give such acts stability, would be turning their privilege of infancy *against* themselves.

Thus, where J. S. mortgaged his estate to C., and then died, leaving D. his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate (p). The mortgage having been suffered to run in arrear three years and a half, C. grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which D.'s mother, with the privity of her nearest relations, stated the account; and D. being then near of age, signed it, and it was admitted to be fair. It was resolved, by the court, that though, regularly, interest should not carry interest against an infant, yet, in some cases, and upon some circumstances, it would be injustice, if interest should not be made principal; and the rather, in this instance, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.

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Mortgagee may pray sale for payment of debts.

Interest not converted into principal by mortgagor's signing private account.

Besides, in this case (q), the mortgagee might have obtained immediate payment of principal and interest, by exhibiting his bill to compel a sale for payment of debts.

But, in general, interest shall not carry interest upon a mortgagor's signing an account (r) whereby he admits so much due for interest; because that, of itself, does not shew any agreement or intent to alter the interest, or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been so determined; for it seems that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate in the land, being to be charged therewith* (z).

(o) Co. Litt. 171 b. 172 a. 315 a.

(p) *Earl of Chesterfield v. Lady Cromwell*, 1 Eq. Ca. Abr. 287, pl. 1.

(q) *Infra*, [try p. 1096.—Ed.]

(r) *Brown v. Barkham*, 1 P. Wms. 652, *supra*, 964.

Practice.

(Z) This writing in practice assumes the form of a deed of further charge, whereby it is particularly agreed that the interest shall be converted into

Lord Keeper North was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed for payment of the interest, upon which an action of debt would lie, the court would allow interest on interest, though no account was taken before a master (s). In that case a mortgage for 1000*l.* had been made [of a reversion in fee expectant on a lease for three lives, in which lease a rent of 7*l.* 10*s.* only was reserved,] and in the deed there were covenants for payment of the principal and 60*l.* *per annum* interest [half-yearly. At the time of filing the bill an arrearage of ten years interest had accrued due(ss),] and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a great loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the court that interest upon interest was at any time allowed in such case. But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it, and therefore it was reasonable that there should be damages given for the non-payment of that money. As to what had been urged, that this had never been practised, and

Interest on interest always allowed, where there is covenant; because mortgagee may recover at law for a breach, with damages (A).

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(s) *Howard v. Harris*, 2 Ch. Ca. 147 to 150. S. C. 1 Vern. 194. 1 Vent. 364, *supra*, 713.

(ss) [These corrections are authorized by Vernon's Report and Chancery Cases.—Ed.]

principal, and the whole sum carry interest. See the form of such a deed in the Appendix, No. XXXII.

The latest case on allowing interest on interest is that of *Sackett v. Bassett*, 4 Madd. Rep. 58; where the defendant mortgaged certain premises to one Brooman, to secure 730*l.*, and interest at 5 *per cent.*, payable half-yearly. Subsequently to the mortgage, various dealings and transactions took place between the parties, and on the 13th March, 1804, another mortgage was taken from Bassett by Brooman, for 1,200*l.*, which sum was composed of the principal and interest due on the first mortgage, and interest upon the interest due. The Master by his report, considered this second mortgage as founded in usury and void. To this report exceptions were taken; and the Vice Chancellor thought it a proper question for the consideration of a court of law. He therefore directed the exceptions to stand over until the question of usury had been tried at law, in an action by the mortgagee, on the covenant in the second mortgage deed.

(A) This case is clearly not law; it was over-ruled in effect very shortly after its decision, by the Master of the Rolls, in *Proctor v. Cowper*, *infra*, 992, and *supra*, 977; and has ever since been considered as of no authority. The learned author raises a distinction, in the next page, whereon he imagines this determination may be sustained; but the case is irrecoverably lost by the assent of both reason and authority.

Second mortgage comprises principal and interest on first, and also interest on the interest due on first,—Qu. if second mortgage void as usurious.

Case in text no authority.

that there was not any such precedent in the court, and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the court, and make all mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest (B) for the residue of the said 60*l.* a year, for which the mortgagee might have *sued at law* and *recovered damages*.

Distinction in support of last case.

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But here we must attend to the distinction between the last case, where the security for the interest rested in *covenant only* (c), and the ordinary cases, where the rents of the mortgaged premises are sufficient to pay the interest, as, if this determination be according to law, it appears to me it must have turned upon that point; for it is certain, that, in general, an agreement made at the time of the mortgage (and a covenant in truth is no more than an agreement) will not be sufficient to make future interest principal, such terms being considered as carrying somewhat of fraud with them; not such fraud as is properly deceit, but such proceedings as lay a particular burthen and hardship upon a man; and against which, therefore, a court of equity relieves.

Agreement at time of mortgage insufficient to convert interest into principal.

Thus, where Y. made a mortgage to O. with a proviso, that if the interest was six months in arrear, then it should be accounted principal and carry interest (t); Lord Chancellor Cowper decreed the clause to be vain and of no use, for that an agreement, *made at the time of the mortgage*, would not be sufficient to make future interest principal, but it was requisite that interest should be first grown due, when an agreement concerning it might then make it principal (D).

(t) *Lord Ossulton v. Lord Yarmouth*, Salk. 449, et vide *Broadway v. Morecraft*, Mos. 247, et *Meers's case*, before Lord Harcourt, mentioned in

Bosunquet v. Dashwood, Ca. temp. Talb. 40, and 1 Atk. 304. 305, [and see this law acknowledged, *East India Co. v. Atkins*, 1 Str. 171.—Ed.]

(B) Whence it may be inferred that the mortgagee was in receipt of the reserved rent, though that fact does not appear on the reports.

(C) *Quære* the accuracy of this statement, as all the three reports agree that there was a mortgage. It is impossible to support the case. It has been long since over-ruled. See antea, p. 917, of this edition, n. (A).

Agreement at time of mort-

(D) But such an agreement will not be usurious at law, though it be not allowed in equity; as where the condition of a bond was for payment of

And so was it likewise held in the case of *Thornhill v. Evans*(u) [that if interest be turned into principal] it must be on a *fair agreement*; and [it was in that case said, that such agreements were seldom entered into, unless] on the advance of

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Interest, if converted into principal, must be on fair agreement.

(u) 2 Atk. 331.

100*l.* with interest at 5*l.* per cent. on payment of 20*l.* yearly, by four quarterly payments of 5*l.* each, until the whole should be paid, and an agreement was indorsed thereon, "that, at the expiration of each year, the year's interest due, should be added to the principal sum; and then the 20*l.* received during the course of the year to be deducted, and the balance to remain as principal; and so continue yearly until both principal and interest should be fully paid." This bond and indorsement were held not to be usurious. *Le Grange v. Hamilton*, 4 T. R. 613; an adjudication which was affirmed in the Exchequer Chamber, 2 Hen. Bl. 144. S. C. 5 T. R. 367. And though Lord Manners, in *Clancarty v. Latouche*, 1 Ball & Bea. 430, appears to have been of a different opinion when he admits, that if an agreement to turn interest into principal constitute part of the original contract, it will, according to *Bosnquet v. Dashwood*, Ca. temp. Talb. 37, be usurious and oppressive, yet it is observable, that no such point occurred in *Bosnquet v. Dashwood*, to which the doctrine under consideration can accord. The agreement in that case was for 10 per cent. by letter and bond, subsequently to the original contract, which was obviously usurious, without reference to the point of compound interest which did not arise throughout the case. But the reason why courts of equity will not allow agreements *a priori* for the annual conversion of interest into principal, are, we have seen, (antea, note (D), vol. i. p. 154, of this edition,) 1st. because a mortgagee cannot originally stipulate for a collateral advantage; and 2d. because it has a tendency to usury although it be not usury in itself. *Chambers v. Goldwin*, 9 Ves. 271.

gage to convert interest into principal at end of year, not usury, though inoperative in equity.

After an acquiescence in accounts annually furnished by bankers, an agreement, that the balance of principal and interest shall bear interest, will be presumed. *Clancarty v. Latouche*, ubi supra. But this, though allowed in transactions between bankers and merchants, is never applied to a case of real security. *Bevan ex parte*, 9 Ves. 224, where it was held, that notwithstanding compound interest could not be taken under an antecedent contract, yet that accounts, *inter mercatores*, might be settled even half yearly, with agreements that the balances shall carry interest; et vide S. L. antea, 909, of this edition, note (T).

Of compound interest between merchants.

On the principle of acquiescence, it was in one case held, where interest had for a length of time been paid on a consolidated sum of principal and interest, that an agreement of consolidation should be presumed, which, in some measure, contravenes the general rule, that interest cannot be converted into principal without an express agreement. The case was this:— In 1730, a decree was pronounced, declaring the sum reported due by judgment, and another sum for interest thereon, to be a charge on the lands; and a sale in three months was directed, if the sums were not then paid. The tenant for life, against whom this decree was made, regularly paid the interest on the consolidated sum down to 1806, when he died. The remainder-man refused to pay interest, on the interest included in the former report, and insisted on credit for the sums that had been paid by the tenant for life, so far as they exceeded the interest of the principal sum, in liquidation of it. The present bill was filed to carry the above decree into execution. An account was directed on the foot of it, and the Master allowed interest on the consolidated sum, to which an exception was taken. Lord Manners said, that in 1780, the principal and interest was ascertained, and a sale decreed to be had in three months; but the owner of the property, being tenant for life, kept down the interest till 1806, when he died. His Lordship would from this infer an agreement between the creditor and the debtor to this effect: "If you will forbear to enforce a sale I will pay you interest;" and the remainder-man must be considered a party to such agreement. The exception was over-ruled, and the Master's report, giving interest on the consolidated sum before decreed, confirmed. *McCarthy v. Lord Llandaff*, 1 Ball & Bea. 376.

Tenant for life pays interest on consolidated sum of principal and interest, for twenty-six years. Agreement to turn interest into principal, inferred; which binds remainder-man.

fresh money, [and even then that it was reckoned a hardship on the mortgagor and an act of oppression; except when there were great arrears (E).]

Interest on arrears not allowed, though profits insufficient to answer same, by reason of dower, but costs must bear interest notwithstanding.

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Interest allowed on money expended in support of title.

Interest upon interest will never be allowed (x), because interest is in arrear *when* the mortgage is paid off. G. in 1741, made a mortgage in fee for 300*l.* to C., of lands worth about 30*l.* *per annum* (y). In 1652 the mortgagee took possession, and, in 1660, devised the lands to E. In 1686 the devisee brought a bill to foreclose, to which the defendant pleaded a settlement prior to the mortgage, but that was found fraudulent; and the wife of the mortgagor had recovered a third part of the estate as dower against the mortgagee, whereby the profits did not answer the interest of the money, which was then 8 *per cent.* *Et per curiam*: the plaintiff must redeem, and shall pay 8 *per cent.* only to the time of the ordinance of parliament that reduced the interest of monies; and though the profits were not sufficient to answer the interest, yet the arrears cannot carry interest, but the cost and charges must (F).

A mortgagee in possession is not obliged to lay out money *any farther* than to keep the estate in necessary repair (z); but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has

(x) 2 Atk. 331, et vide Pre. Ch. 116.

(y) *Proctor v. Couper*, Pre. Ch. 116. [S. C. antea, 197.—Ed.]

(z) *Godfrey v. Watson*, 3 Atk. 518.

[S. C. antea, 189, of this edition, n. (Q).—Ed.]

Of rate of interest, on interest converted into principal.

(E) The case of *Thornhill v. Evans*, is also reported in 9 Mod. 333, which, with the report in Atkyns, sanctions the above corrections within brackets. The same case also furnishes authority for the position, that where interest is commuted into principal it will carry interest according to the rate which the principal previously bore; as if it be at 4 *per cent.*, the interest on the interest which has become principal, will be computed at 4 *per cent.* likewise. But if money be lent at 4 *per cent.*, and on a future advance the arrears of interest are converted into principal at *lawful* interest; the interest thus become principal will bear interest at 5 *per cent.* (3 Mod. 333); for where a sum is by a written undertaking agreed to be paid at a day certain, interest at 5 *per cent.* is allowed at law. *Slack v. Lovell*, 3 Taunt. 159. And the Master of the Rolls, in a recent case said, it would be ridiculous to have a different rule in equity. See *Upton v. Ferrers*, 5 Ves. 803; also *Parker v. Hutchinson*, 3 Ves. 135; and *Forrest v. Elwes*, 4 Ves. 497; et vide the next page, note (H).

Interest on interest.

(F) This latter sentence of the text is current authority, notwithstanding the case of *Howard v. Harris*, antea, p. 988, to the contrary. And we may add, that the court will not decree interest upon interest, by reason of a custom in a foreign country in which the mortgage contract was entered into. *Boddam v. Riley*, 2 Bro. C. C. 3. And it is observable, that in *Murray v. Palmer*, 2 Sch. & Lef. 488, it was held, that where a sale is avoided, the purchase money for which was secured by an instrument bearing interest, and interest has been paid thereon, such payments are to be considered as principal, and are to be refunded with interest; for the transaction being avoided, the vendor is not entitled to any thing as interest.

been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry interest (G).

A remainder-man can force the tenant for life to keep the interest down if the land be charged (a), but cannot compel him to redeem directly, though indirectly he may by purchasing in the mortgage [and preferring his bill for foreclosure]; then

Tenant for life compellable by remainder-man to keep down interest (H).

(a) *Hungerford v. Hungerford*, Gilb. Eq. Rep. 69.

(G) After the rate of the original loan; see p. 920, of this edition, n. (E). So in the case of *Woolley v. Drage*, (2 Anstr. 551), on a bill to redeem, the matter was referred to the Deputy Remembrancer of the Court of Exchequer, to take the usual accounts. The principal money lent, carried 5 per cent. interest. The mortgagee being in possession, had advanced money for fines on renewals of leases, under which the premises were held. Upon these sums the Deputy Remembrancer allowed only 4 per cent. interest. Exceptions being taken, the court allowed the same, observing, that the interest upon the advances must be regulated by the interest payable upon the money originally lent. But it should be observed, that since in these cases interest is allowed by the course of the court, and not by the agreement of the parties, the rate is always regulated according to the discretion of the court. *Astley v. Powis*, 1 Ves. 496; and the standing rate of interest in Chancery is 4 per cent. *Spurway v. Glynn*, 9 Ves. 483; and *Wood v. Penoyre*, 13 Ves. 325.

Money disbursed by mortgagee, carries interest as original sum.

(H) See also similar law in *Saville v. Saville*, 2 Atk. 463; and *Tracey v. Hereford*, 2 Bro. C. C. 128; *Lewis v. Nangle*, ante, 875, of this edition, text. In *Revel v. Watkinson*, 1 Ves. 93, it was held, that a tenant for life must keep down the interest though the whole of the rents and profits may be thereby exhausted; but, it was said, that the court would allow a reasonable sum for his maintenance out of the profits, if he were otherwise unprovided for.

Tenant for life allowed maintenance, if interest exhaust whole rents.

If there be tenant for life with remainder to another for life, and, during the first estate for life, the whole profits are not sufficient to answer the interest of the debts, so that there is an arrear, such arrear will become a charge upon the inheritance, provided both estates for life are limited by the same settlement. But if they are not created by the same instrument, and there is first a deficiency, and afterwards more than sufficient, the surplus accruing to the trust estate will be applied to answer the former deficiency; any other construction would create much inconvenience and confusion. So if a tenant for life of an estate, let on leases for lives, should receive the profits of fines for renewal on lives dropping in, he must apply those profits to the discharge of arrears of interest previously incurred; for otherwise a great burthen would ultimately fall on the remainder-man. *Revel v. Watkinson*, 1 Ves. 94. So if a mortgage be made of a variety of estates, part in possession, and part in reversion expectant upon the life estate of A., and afterwards all those mortgaged estates come to B. for life (living A.), B. must apply all the profits of his life estate in possession in keeping down the interest of the mortgage; and, if those profits are insufficient, his life estate in reversion, upon the death of A., will be chargeable with the arrears of the interest; and the rule will be the same, though by this means, it may turn out, that B. never obtained the least advantage from his life estate; *Tracey v. Lady Hereford*, ubi supra; from which this general rule may be deduced, that the taker of two funds, one productive and the other unproductive, as an estate in possession and an estate in reversion, must keep down the interest of the whole charges upon them, and pay off the accruing interest out of the rents and profits of the life estate before he can take any benefit of the devise; and that he will not be allowed to throw the charge on the reversion.

But he must apply accruing profits in discharge of former arrears.

The leading case on this head is that of *Penrhyn v. Hughes*, 5 Ves. 106, wherein the Master of the Rolls said that nothing was more clear than that if a tenant for life continues in possession, but applies no part of the rents and profits in reduction of the [interest on the] mortgage, though, as between the mortgagee and the estate, the mortgagee would have a right to be paid out of the estate into whosoever hands it might come; yet the reversioner might

Reversioner may file bill against tenant for life, to make him answer arrears.

the tenant for life must pay one-third (aa), or part with the possession. Thus, where A. granted a charge of 100*l.* per annum in fee (b), and devised estates to B. for life, remainder to C. in fee, and then died. C. exhibited his bill, to compel the

(aa) [Or other proportion, according to the rule laid down in p. 312, ante, of this edition, n. (M).—Ed.]

(b) Cited in *Hayes v. Hayes*, 1 Ch. Ca. 223.

Rents of life estate applicable to discharge arrears accumulating during former life.

When estate in mortgage is sold, tenant for life entitled to interest of money after paying incumbrance. Observations on latter rule.

Arrears considered in reference to tenant for life, mortgagee, and remainder-man.

file a bill to make the rents amenable, and compel the tenant for life to answer for what had accrued. The Master of the Rolls added, that however hard it might be on the tenant for life, yet it was perfectly established that the rents and profits during the estate for life must be applied in reduction of any interest accrued prior, as well as subsequent, to the commencement of that estate; and, in the case before him, (the circumstances of which are briefly stated, ante, p. 293, *in notis*) he was bound to declare that all the interest which had accrued due, during the possession of the plaintiff, ought to be applied in keeping down the interest, not only that might have accrued during that possession, but all that had accrued previously. The ground was, that the estate in the hands of the tenant for life was liable to incumbrances; and the estate for life was, in the first place, amenable, and might be made so by an application on the part of the reversioners, to all the interest accrued due upon incumbrances prior to that estate for life. It was very hard; for the tenant for life might lose all his estate. But it was to be remembered that both the tenant for life and the incumbrancers had a right to have the estate sold; and if so, then the tenant for life would have his estate for life in what remained of the money produced by the sale after the incumbrances were paid; and it would be divided as the law provided (*viz.*) in the proportions their interests bore to the estate. To explain this proportion, the tenant for life or incumbrancer might apply to the court, and then the estate would be sold; and what remained after discharging the incumbrances, would be put out at interest, and the tenant for life would be entitled to the interest of the investment.

On this latter expression of the rule, a case might be put extremely oppressive to the remainder-man. Suppose a tenant for life to have permitted the interest to run in arrear for a considerable time, and then to apply to the court for a sale. If a sale were directed, and out of the produce the incumbrance and all arrears were paid, and the tenant for life allowed to receive the interest of the residue, it would, in fact, amount to a payment of the arrears out of the corpus of the estate, which in right belongs to the remainder-man. His Honour's expressions are certainly open to this interpretation; but such, it is presumed, was not his meaning. In *Thyn v. Duwall*, 3 Vern. 117, the bill was to be redeemed or foreclose. It was objected that the defendant was only tenant for life of the equity of redemption, and the remainder-men over were not made parties. The court directed a bill to be brought by the defendant Duwall, to have a sale made; the mortgage debt paid; and the surplus distributed amongst the tenants for life and remainder-men in proportion according to their respective interests. At the present day, it is apprehended, that a Master would in such case be directed to ascertain what share or interest in the surplus, should, under all the circumstances, be awarded to the tenant for life.

With respect to arrears, the mortgagee or incumbrancer can in very few instances (and those are noticed in n. (1), p. 293, ante) lose all title to them; for they are charges on the land as well as the principal, and must be borne by the estate, though they accrue during the life-time of the particular tenant, and are levied after his death on the remainder-man. As between the particular tenant and remainder-man, the latter is in possession of three remedies to protect himself from an accumulation of interest, first, he may if the tenant for life be living, and the mortgagee be not in possession, apply to the court for a receiver, with directions for him to take the rents half-yearly, pay the current interest, apply the surplus in liquidation of the arrears, and remit the residue from time to time to the tenant for life, see ante, vol. i. p. 300, of this edition, *in notis*. Second, he may

tenant for life to pay the arrears, as otherwise all would fall on the reversioner, and it was so decreed.

file a bill to make the rents amenable to the interest, and to compel the tenant for life to answer out of his effects for the arrears. *Penryhn v. Hughes*, ubi supra; and, *Third*, he may, in case of the death of the particular tenant, file a bill against his executors, to be reimbursed the arrears which he has paid to the incumbrancer, and which accrued due in the life-time, and are therefore the proper debt of, the particular tenant; see *Chaplin v. Chaplin*, 3 P. Wms. 235, 5 Ves. 106, and *Finch v. Finch*, 1 Ves. jun. 555. Yet some observations which fell from the late Master of the Rolls, in *Bertie v. Lord Abingdon*, 3 Meriv. 566, may possibly be considered as affording authority for the contrary position, viz. that the assets of a tenant for life are not answerable for the arrears which may have accumulated during his life-time. The observations alluded to are these:—"The remainder-man takes subject to all incumbrances. What the incumbrances are is a mere question of fact. Unpaid interest is as much a part of the incumbrance as the principal money. In point of fact, the interest of the mortgage made by Peregrine Bertie to the trustees under the late Lord Abingdon's settlement is unpaid; *prima facie*, therefore, it must constitute a charge upon the real estate; and the owner of the real estate has no right to call upon the owner of the personal estate [of the preceding tenant] to exonerate him from that charge." 3 Meriv. 566, 7. These observations, however, were made in a case which was very peculiarly circumstanced (see *antea*, p. 300, *in notis*), and do not in direct terms affirm that the assets of a deceased tenant for life are not answerable for arrears of interest which have accrued due on a mortgage or other incumbrance during his life-time. This led the writer into an error in p. 293, *antea*, of this edition. Nevertheless, the reader should bear in mind, that there is no express authority either the one way or the other. But Lord Hardwicke's observations in 3 P. Wms. 235, are obviously incompatible with the doctrine, that the death of the tenant for life exonerates his effects from the payment of arrears of interest which he ought to have discharged in his life-time. Whether, the assets of the last tenant for life will be answerable for arrears of a preceding tenant, has not in any case been even hinted at; but it is presumed they would, if it could be proved that the rents were sufficient to pay the current interest, and also the arrears, and that the former tenant for life was in receipt of those rents, at least so it may be inferred from the case of *Penryhn v. Hughes* so frequently referred to in the earlier part of this note.

Assets of tenant for life answerable for arrears, when.

This rule compelling a tenant for life to discharge the interest of mortgages and other real incumbrances, applies as well to a tenant in dower and a tenant by the curtesy, as to any other species of tenant for life, *Gwillim v. Holland* and *Monksfield v. Bunbury*, 2 Bro. C. C. 128, Belt's ed. n. (1); except that as to the dowress, she being entitled but to one-third of the estate during her life, will not be compelled to keep down more than one-third of the interest of any charges affecting her dower (*Banks v. Sutton*, 2 P. Wms. 716); and as to her share of the principal (supposing that in order to be let into her dower, she is obliged to redeem the whole mortgage) some authorities treat her as being liable to pay one-third of the principal; see *antea*, 681 and 684 of this edition, in the text; but according to the modern rule which is mentioned in note (M), *antea*, p. 312, of this edition, it is conceived that if she redeem the whole mortgage, she will ultimately have a claim on the estate for two-thirds of the interest and the whole of the principal. Et vide *antea*, 681, of this edition, n. (K).

Dowress redeeming has claim on estate for two-thirds of interest, and whole of principal.

It is also understood to be law, that a tenant for life must keep down the interest up to the day of his death, and not only so far as the preceding quarter or half year may extend; for the interest on a mortgage becomes due from day to day, and the mortgagee may call in his money whenever he will. See *Edwards v. Warwick*, *infra*, 1042.

Tenant for life must keep down interest to day of his death.

In a case where a son entitled to a remainder in tail, joined his father tenant for life in suffering a recovery, whereby a former mortgage on the estate was let in, and the father and son both joined in a covenant to pay the mortgage money and interest; and the mortgagee warranted to the son the payment of a certain annuity out of the lands, and then suffered the father to take the profits of the lands, and failed in payment of the annuity,

Son joining father in mortgage not liable to interest till his father's death.

Contra, of tenant in tail; for he has estate of inheritance and power over reversion (K).

If there be tenant in tail (c), remainder over, subject to a preceding mortgage or incumbrance, and tenant in tail be in possession, and receipt of the rents and profits, and lets the interest run in arrear, without applying them to keep it down, neither the issue in tail or the remainder-man can come against the tenant in tail, to compel the keeping down the interest, or against his representatives after his death, to compel the indemnifying and discharging the remainder from the arrears of interest (d) incurred during his possession and receipt of the profits; for, in this case, courts of law as well as of equity consider the reversioner, or remainder-man, as in the power of the tenant in tail.

And infant tenant in tail not compellable to pay interest, so as to charge his assets for arrears, though he hath no power to suffer recovery.

[995]

Thus, where P. C. made a mortgage for years (e), and then entailed the estate mortgaged on himself and the heirs male of his body, remainder to his brother I. C. in tail male, and afterwards died, leaving issue one infant son; the latter suffered the interest to run in arrear for nearly twenty years, and died just before he came of age, leaving a personal estate. Upon a bill filed against his representatives, it was insisted, that his executors, seeing their testator took the rents and profits of the estate, ought to keep down the interest, and the rather, he having never had it in his power to bar the estate by a recovery; *sed per curiam*, there was no precedent of a tenant in tail being obliged to keep down the interest upon a mortgage; for he had an estate which might last for ever, and the remainder over was not assets or regarded in law; and as he had a power over the

(c) *Amesbury v. Brown*, 1 Ves. 477.

2 Bro. C. C. 123.

(d) 1 Ves. 480.

(e) *Chaplin v. Chaplin*, 3 P. Wms. 235. Hilary, 1733.

it was held upon an appeal in Ireland, that the mortgagee had no claim on the son for the arrears of interest accumulating during the life-time of the father. *Gay v. Cox*, 1 Ridgw. P. C. 153, et vide *S. C. antea*, 871, of this edition, n. (B).

Principal of charge directed to be paid out of rents,—that sum paid off, tenant for life liable to pay interest only of a new sum borrowed.

In another case Lord Northington put this question to the counsel in the cause: Suppose tenant in fee subject to a mortgage of 3000*l.* devises to A. for life, remainder to B. in fee, and directs the rents and profits to be applied in discharge of the principal of the said sum of 3000*l.*, and they both join in a new mortgage for 3000*l.* paying off the old loan; could B. come into a court of equity to have the old trust of the rents and profits applied? To which the counsel for the defendant submitted he could; the Lord Keeper thought the contrary; for a new sum was charged on the estate secured by a new term, which must follow the general rule of the court, and while it continued on the estate the particular tenants were only bound to keep down the interest. *Peterborough v. Mordaunt*, 1 Eden, 474.

(K) But a tenant in tail, who is by act of parliament prevented from barring the remainders, as, tenant in tail of the gift of the Crown for services performed, or otherwise, is reduced to the situation of a tenant for life, and must keep down the interest of incumbrances. *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 126. *S. C.* 1 Ves. jun. 227.

estate to commit any waste or spoil thereon, a court of equity had never enjoined him to keep down the interest; and the court refused to make any order upon the executors to pay the arrears.

But by a later decision it seems now to be settled, that if tenant in tail be an infant, *not otherwise*, and his guardians or trustees be in possession of the profits of the estate, he shall be liable to pay the interest, because what *ought* to be done by the guardian should be considered as done; and it is a rule, that the act of a guardian or trustee of an infant shall not alter his [the infant's] property, or *that* of those *coming after him* (f); and the reason why tenant in tail is not liable to pay the interest, which is because he can bar the whole estate, does

Now otherwise, and infant tenant in tail liable to pay interest (L.).

[996]

(f) *Winchelsea v. Norcliffe*, 2 Ch. Rep. 170. 1 Eq. Ca. Abr. 262, [et vide infra, p. 1005. The paragraph there was, it is conceived, intended

to be introduced and read before the case of *Amesbury v. Brown*, immediately stated by the learned author at length.—Ed.]

(L) Lord Hardwicke said, that if in the present case (*Sergison v. Sealey*, 2 Atk. 416) there had been an application to the court during the infant's life by his guardian, the court would have directed the interest of this 2000*l.* to be kept down out of the rents and profits of his estate, and not out of his personal estate. His Lordship added, "Suppose an infant tenant in tail with remainder [to himself] in fee, had nothing to support him but the rents and profits of real estate, and would starve if they were to be applied to keep down interest, I should not, in that case, have directed them to be so applied; but here there is a large personal estate, besides the rents and profits of the real estate, which makes the difference." Consequently if an infant tenant in tail hath no other means of support than the rents and profits of the estate, he will not be obliged to pay interest on incumbrances, if the incumbrancers themselves forbear to sue for their demands, or rather the equity would perhaps be that the infant tenant in tail should keep down the interest with a reasonable allowance for his support. See *Revel v. Watkinson*, 1 Ves. 95. But we have seen (antea, p. 300, of this edition, *in notis*, sec. vi.) that the obligation to keep down interest can only be enforced by the remainder-man. It follows, that if the infant tenant in tail attains his age of 21 years, and suffers a recovery, whereby the remainder is destroyed, the question cannot be agitated, and the real and personal representatives of the *quondam* tenant in tail must take the state of things as they find them, there being no equity for the executor to say, that the real estate ought to bear the arrears of interest which accrued in the life-time of his testator. *Bertie v. Abingdon*, 3 Meriv. 560. *Gressley v. Adderley*, 1 Swanst. 579. 8 L. antea, 304, of this edition, *in notis*, sec. ix. 3. In the former case the Master of the Rolls said, there could be no question with respect to the obligation on an infant tenant in tail, to keep down the interest of incumbrances out of the rents and profits of the estate; but his Honour added, that it was only by a reversioner or remainder-man, that such an obligation, if it at all existed, could be enforced. In the case before him, Mr. Wm. Bertie, the tenant in tail, coming of age, suffered a recovery, and re-settled the estate. There was therefore no reversioner or remainder-man to agitate the question as to what ought, or what ought not to have been done with respect to the incumbrances on that estate. *Bertie v. Abingdon*, ubi supra.

Infant tenant in tail to keep down interest, when.

If an infant tenant in tail is to keep down interest, and his guardian be in receipt of the rents, then if such guardian permit the interest to run in arrear, the guardian or his executor will be personally responsible to the infant for such neglect when he attains his full age. See infra, p. 1005.

not operate in this case; for an infant cannot bar the remainders, unless under the king's privy seal (*g*), which is never granted voluntarily to change the rights of the parties, but only in case of family settlements.

Thus, where P. was tenant for life of an estate, with power to charge any sum not exceeding 4000*l.* thereon, remainder to W. her son, in tail, remainder to the right heirs of her father, *she* charged the estate accordingly, and then died (*h*). W. died without heirs and under age, leaving the interest in arrear. The plaintiff claimed the remainder as right heir of the father, insisting, that as he was under no necessity of claiming as heir at law of W., the remainder in fee not having vested in possession in his *life*, the personal estate of W. must be applied to pay the interest of the 4000*l.* during his life; but Lord Hardwicke was against the plaintiff on this ground, and decreed for him only on the rule above-mentioned (*m*).

[997]

Tenant in tail paying interest, no creditor on estate.

But if tenant in tail discharge the interest of incumbrances, neither he nor any in his place will be permitted to set up *that* as a fact undone, but the remainder-man shall have the benefit of it (*i*); and none in the place of tenant in tail can insist on being a creditor upon that estate (*n*).

(*g*) *Sir John St. Alban's case*, Salk. 567.

(*h*) *Sergison v. Sealey*, Oct. 25th, 1742. 2 Atk. 416. Cited 1 Ves. 477. 4 80, and confirmed.

(*i*) *Amesbury v. Brown*, 1 Ves. 477. S. C. *supra*, 242. 994, [822, of this edition, in *notis*, et vide *Brompton v. Alkis*, 2 Vern. 566.—Ed.]

Doubtful whether assets of infant tenant in tail (his guardian being in receipt of rents) must discharge arrears.

(*M*) It may be inferred from this statement of the case, that Lord Hardwicke was against the plaintiff, on the ground that the assets of the infant were not liable to answer for interest which he ought to have paid during his life. His Lordship's observations were these:—"I do not so much as remember an instance where even a tenant in tail has been obliged to keep down interest; but if he dies during his infancy, and the remainder in fee is limited to a stranger, it may possibly make some difference: but I will not determine now how the court would direct in that case; there must be an account taken of the rents and profits of the real estate of the infant, descended upon Mrs. Sergison, the wife of the plaintiff, and so much of them applied as will pay off the interest due upon the 2000*l.* appointed to Mr. Speake, which must be at the rate of 4 per cent. and commence from one year after the execution of the articles of appointment." The account of the rents and profits here directed was, it is presumed, an account of what had accrued due during the infancy, and which had been received by the infant, his trustees, or guardians. If this be so, the case of *Sergison v. Sealey*, stands as an authority for the position, that the personal estate, of an infant tenant in tail, subject to a mortgage, will be liable to answer for the arrears of interest accruing due during infancy, if his guardian or trustee has been in receipt of the rents and profits of the estate in the interval, and applied them to the infant's benefit. But it should be distinctly remembered, that in this case the infant died, leaving a large personal estate, as stated in the preceding note, and this circumstance was much relied on in the decision.

Text confirmed.

(*N*) In a recent case Lord Manners said, that although the case of *Amesbury v. Brown*, 1 Ves. 477, had been ingeniously put, and much relied

If there be baron and feme, and the husband take in a mortgage of an estate of which his wife is tenant in tail, and is in receipt of the rents; the husband will not be allowed interest on the mortgage during the life of his wife, on a bill exhibited by them in reversion after her death.

Thus, where A. seised in tail of the equity of redemption of an estate (k), reversion in fee to the right heirs of her brother (which heirs were four sisters, A. being one) levied a fine and made a conveyance thereof to B., by lease and release, in consideration of money paid, and of paying 600*l.* due on the mortgage, and several legacies charged on the estate by the testator's will, under which she claimed. Afterwards she intermarried with B., and previous to the marriage a settlement was made of this estate (which was the husband's under the prior purchase) to the husband for life, remainder to the wife for ninety-nine years, if she so long lived, remainder to the issue of the marriage, remainder over. After the marriage the husband took an assignment of the mortgage, reciting that the pre-

Husband purchasing in mortgage on wife's estate, and being in receipt of rents, not allowed interest till death of his wife, though she be tenant in tail (o).

[998]

(k) *Amesbury v. Brown*, 1 Ves. 477. S. C. *supra*, 242. 994.

on, it only amounted to this; that though a tenant in tail is not obliged to keep down the interest on a charge affecting the estate, yet if he do so, his personal representative will not be allowed it against the estate, which did not apply to the case before him. *Redington v. Redington*, 1 Ball & Bea. 143. For similar law, see *Bertie v. Abingdon*, 3 Meriv. 568.

(O) Nor, indeed, will the husband be allowed interest on such a mortgage during his own life if he be tenant by the curtesy, for as such he is bound to keep down the interest. *Monksford v. Buxbury*, ante, p. 923, of this edition, n. (H); and *Corbett v. Barker*, 3 Anstr. 759. But the husband of a mortgagor in fee is not obliged to keep down the interest during the joint lives of himself and wife; for a tenant in fee may permit the interest to run in arrear to any amount, and such arrears will remain a charge on the estate, and his real and personal representatives cannot, in such case, vary the order and liability of the funds, or change the rights of the parties as fortune has left them; see ante, 301, of this edition, in *notis*, and 3 Meriv. 568. In *Ruscomb v. Hare*, 6 Dow P. C. 21, (a case involving the law now under consideration,) Lord Eldon said, there were some errors in the decree below:—"The wife died in 1794, and the husband in 1799, and the decree directed that the interest [on the mortgage] should be computed from the death of the husband. While both the wife and husband lived they were not bound to keep down the interest; but when the wife died the husband became tenant for life by the curtesy; and, as tenant for life, was bound to keep down the interest from that time. But the decree directed no account of the interest till the death of the husband. Another consideration was, that as they were not bound to keep down the interest on the mortgage of 1766, how was that to be provided for? The arrear of interest at the death of the wife must be converted into principal, and considered as a charge on the estate, and the estate must answer it. So that the arrear of interest is to be converted into principal at the death of the wife; and to be considered as a charge on the estate, and from that time the husband was bound to keep down the interest." Hence, we see, that though the husband of a mortgagor in fee is not compellable to keep down the interest during the coverture, yet if he be tenant by the curtesy he must, contrary to the general rule, pay interest on the arrears which have accrued due during the joint lives of himself and wife.

Tenant in fee not obliged to keep down interest. So of husband of tenant in fee during coverture; but if he afterwards becomes tenant by curtesy, he must pay interest on arrears accruing during coverture.

*Amesbury v.
Brown.*

[999]

mises had been devised to his wife, and also took a conveyance of the legal estate in fee to his own use. The wife died without issue, the husband continued in possession. Then the three co-heirs of the first testator being entitled to the reversion in fee, brought a bill against B. to redeem this estate, on payment of such part of the incumbrances thereon, as they were bound by law to discharge, insisting, that they were not obliged to pay interest on the principal sum of these incumbrances, farther back than *from the death of the wife*; for B. having taken in the mortgage, and received the profits, the interest during *her* life would be supposed to be paid; and so it was held by Lord Hardwicke, who said, that there was no determination *directly* on the point, therefore he must decide on general principles.

The wife was entitled herself to the reversion in fee of one-fourth part (*l*), the other three-fourths thereof belonging to the plaintiffs, the three co-heirs. She might by recovery have barred the reversion in fee in the *whole*; by fine she could bar it in *her own* fourth part. The taking the assignment of the mortgage by the husband, appeared from the recital to have been after the marriage, when the husband, if the settlement had been good; was seised in his *own* right for life; if not good, and the estate in tail continued, he was seised in right of *his wife*.

The question was, from what time interest was to be computed? He was of opinion, that the husband was not entitled to have any allowance of three-fourth parts of the interest during the time he was in possession, considering him in any light.

[1000]

First, as a purchaser of this estate, by the assignment and conveyances made by the wife, when a feme sole, which was the true way; but if that was out of the case, considering him as husband of tenant in tail, in possession of the estate, having taken in a mortgage thereof, the rule of equity would be, that his purchase would be defeated, but he would have the benefit of the mortgage, so taken in for satisfaction of his principal and interest, so far as they were not satisfied by the rents and profits of the estate; for in that case he must be considered as a mortgagee; if, as a mortgagee in possession, he must account for the rents and profits of the estate, and out of them the interest of the mortgage must be kept down; if he had purchased the reversion only, and taken an assignment of the mortgage, and never come into possession, and his purchase had been

(l) *Amesbury v. Brown*, 1 Ves. 477.

then defeated, and he evicted, he would have been entitled to have had his whole principal and interest; because he would have received nothing of the estate to keep down the interest.

Amesbury v. Brown.

So it would be on the foot of the purchase, taking it in the least favourable light for the plaintiffs; nor on the foot of the settlement would it mend the case; for as tenant for life under that settlement he would be bound to keep down the interest, so would the wife have been if she had survived.

This brought his Lordship to the second way of considering it, namely, as if the purchase and settlement were out of the case, and looking upon the husband as having married tenant in tail of an estate, reversion in fee to strangers as to three-fourths, and being in possession in her right, taking in a preceding mortgage, binding that estate in tail, and afterwards continuing in possession, and receiving the rents and profits.

[1001]

The question *then* would be, whether such an husband, after the death of his wife without issue, was entitled, notwithstanding the receipt of the profits, not to be redeemed without payment of the whole interest? In general, a court of equity endeavoured to make every part of the ownership of an estate bear part of the incumbrance; as if there were tenant for years, or life, subject to a mortgage, he must keep down the interest during his time. Suppose the tenant in tail had not married, but had taken an assignment of the mortgage to herself, and died, without barring the remainder in fee; taking the assignment to herself, she would have been considered as owner, and seised of an estate, which might have continued for ever; then perhaps the reversioner would have had stronger reason to say, that the whole estate was discharged of this mortgage (*U*), than on the other side, the representatives of tenant in tail would have to say, that they should be reimbursed the interest incurred due during her life, because it might be considered as waiting upon the inheritance during that time; but it had not been carried so far as that. In the case of Mr. Smith, of Wheale Hall, in Essex, tenant in tail died, without barring, but had taken in a mortgage, which was considered, for the principal, as an incumbrance on the estate, but the question of interest did not arise there. No case had been cited where such a tenant in tail, being in possession, his personal representative had been allowed to burthen the reversion in fee with the interest incurred during his life, where he was owner both

Tenant for years or for life, subject to mortgage, must keep down interest.

[1002]

(U) [The rules on this subject note, see antea, 316, of this edition, n. (T).—Ed.]

*Amesbury v.
Brown.*

[1003]

of the estate in possession and the charge; and it would be of very mischievous consequence, if it should be taken to be otherwise. Suppose she, after taking the mortgage, had married, and then died, leaving issue in tail; could her personal representatives come against the issue, to burthen the estate with the interest of that mortgage? It would be considered, as *taken in* for the *benefit* of the issue in tail. Cases of this kind depended on such a variety of circumstances, that it was impossible to draw the line. The tenant in tail was but tenant at will to the mortgagee, who might have brought an ejectment, turned her out possession, and have received the rents and profits; *then* the profits would have been taken from the tenant in tail during her life. Suppose tenant in tail had afterwards brought a bill to redeem the mortgage, she must have redeemed on payment of principal, interest, and costs; should that burthen the estate of the remainder, with all the interest, which had been paid out of the rents and profits of that estate, in the hands of the mortgagee? None could tell when tenant in tail took the mortgage, or on what grounds it was done. The reason might be, that the mortgagee intended to have brought an ejectment, turned her out of possession, and taken the rents and profits to his own use: that did not appear, but there might be various reasons for taking in the mortgage; as, to prevent suits by foreclosure, or ejectment; and it would be making it liable to too great uncertainty to say, that all the minute considerations of tenant in tail, taking an assignment of a mortgage, should be considered by the court, upon a question between the personal representative of tenant in tail and the reversioner, after it came into possession. His Lordship did not see how this differed from the case of interest paid by tenant in tail.

[1004]

He was unwilling to make a precedent of the representatives of tenant in tail, calling back the interest of an incumbrance paid. It was right to let things stand as the courts found them, at the death of the tenant in tail. And though that was not strictly this case, this being a case of a mortgage taken in by husband of tenant in tail, seised in right of his wife, yet that would not make any difference; for the husband of tenant in tail, so seised, ought to be considered *exactly* in the same state as tenant in tail would be, and in no better; namely, taking the estate subject to all the incumbrances, actions, and remedies the mortgagee had therein, and to the right and estate of the reversioner, or remainder-man; consequently, as not having a

right, after having received the profits of the estate during the life of the wife, to come against the remainder-man for satisfaction of the interest, which, naturally, the rents and profits were to answer.

Amesbury v. Brown.

This was not setting up a right to call upon the personal estate of tenant in tail to satisfy arrears of interest, but setting up a right, in the representatives of tenant in tail, to bring a burthen on the reversioner in fee, which had been discharged by tenant in tail himself; and as there was no precedent, he would not make one.

[1005]

The guardian of an infant shall not by his neglect, in favour of the personal fund, subject the real estate to the discharge of interest on a mortgage, to which, if due diligence had been used, it had not been liable (ss). One having two sons, R. and T. (t), and being seised in fee of the manor of B. (which manor was in mortgage) left two sons, one of which died at two years old, and the other at six years old; whereupon the estate descended to the uncle. The guardian of the son had neglected to discharge the interest of the mortgage, and the question was, whether he or the uncle should pay it? It was contended, that the guardian of the son, who was in possession, ought, out of the profits, to have kept down the interest of the mortgage, like the case, where a man mortgages land, and devises to A. for life, remainder to B. in fee; A. must keep down the interest. *Sed per curiam*, that is not like the present case; for in the case cited, a third person, the remainder-man, and one not claiming under the tenant for life, would suffer by non-payment of interest; otherwise here, where the son was entitled to the whole fee-simple, and might, when of age, charge or alien the whole. And if a devisee in fee of a mortgaged estate be of age, and suffers the interest to go greatly in arrear, his executor shall not be bound out of the rents (tt) to keep down the same; but this being in the case of an infant and a guardian, it would be a great inconvenience, if the guardian might ruin the inheritance (which it is his duty to preserve) by letting the interest run on, and this to increase the personal estate, of which, possibly, he may be in expectation. And the guardian or his executor, in case of his death, was decreed to answer the interest out of the profits.

Infant mortgagor in fee dies under age. Guardian or his executor permitting interest to run in arrear, personally responsible.

[1006]

Executor of adult devisee in fee, not liable for arrears of interest.

(ss) [And that a guardian may pay interest of incumbrances, see *antea*, 284, of this edition, in the text.—*Ed.*]

(t) *Jennings v. Looks*, 2 P. Wms. 276.

(tt) [That is, it is presumed, out of the rents received by such devisee, the benefit of which ultimately devolves on the executor, by an increase of the personal estate.—*Ed.*]

First mortgagee in possession, charged with what he might have received (uu).

[1007]

No conversion of interest with notice.

Payment to scrivener having bond, good (q).

If a first mortgagee *enter* (u), and afterwards suffer the mortgagor to take the profits, without requiring interest, the lands, in the hands of a second mortgagee, shall not be charged with any interest for that time; that is, the interest of the first mortgagee shall not affect the lands, so as to keep out the second mortgagee longer than he would have been kept out, if the interest had been duly paid.

A prior incumbrancer (x) having notice of subsequent incumbrancers, shall not turn the interest into principal against them (p).

If a scrivener is intrusted with the custody of a mortgage-bond (y), he may receive the interest; and though he fail, yet the mortgagee shall bear the loss: and so it will also be, in such case, if he receive the principal, and deliver up the bond;

(u) *Bentham v. Haincourt*, Pre. Ch. 30.

(uu) [This subject is fully treated of, antea, 391, of this edition, n. (D), et vide infra, p. 1048, 1049.—Ed.]

(x) *Digby v. Craggs*, Amb. Rep.

612, [S. C. 2 Eden, 200, and S. L. antea, 910, of this edition.—Ed.]

(y) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. S. C. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

Prior incumbrancer not allowed to turn interest into principal as against subsequent incumbrancer, with notice.

(P) That is, without the consent of the second incumbrancer. The general rule is mentioned, antea, p. 908, of this edition. The doctrine in the text had been established long before Lord Northington's time, in the case of *Montague v. Ratcliffe*, 5th June, 1706, where it was held, that the assignee of the first mortgage, having notice of the second mortgage, should not turn interest into principal. 2 Fonbl. 438, n. (o), 5th edition. The case of *Digby v. Craggs*, is thus reported in 2 Eden, 200:—J. N. Craggs, by indentures of lease and release, mortgaged his estate at C. to the plaintiff, Mrs. Digby, for securing the sum of 14,000*l.* with interest, at 4 per cent. Being indebted for interest upon the said mortgage, by indorsement on the mortgage deed, he charged the premises with the further sum of 1247*l.*; he afterwards charged the premises with several annuities and incumbrances, of which Mrs. Digby had notice; and becoming still further indebted to her for interest on the said mortgage, by another indorsement in 1757, he charged the premises with the further sum of 1342*l.* The bill was for interest upon the whole sum of 16,589*l.* from March, 1757, or for a foreclosure. Lord Northington was of opinion, that the interest could not be turned into principal by the indorsement of March, 1757, as against the subsequent annuitants and incumbrancers, Mrs. Digby having had notice of such incumbrances. The case of *Greenley v. Howe*, at the Rolls, 18th February, 1763, could not alter this opinion. The ground, his Honour proceeded on, in that case was, that if a first mortgagee had filed a bill, his interest, after a report confirmed, would have become principal, [S. L., antea, p. 911, of this edition, text] and, therefore, it was reasonable that that might be done amicably which might be got at by adverse proceedings, and especially as the costs of such adverse proceedings must have come out of the estate, and consequently would have lessened the security of the other incumbrancers. If a bill had been filed by the first mortgagee, it seemed the second might have redeemed him.

That may be done amicably which may be obtained adversely seriously.

But costs may be turned into principal, notwithstanding such notice.

Scrivener with- in bankrupt

But though a first incumbrancer cannot, with notice of a subsequent incumbrancer, turn interest into principal as against him, yet it seems he may make his costs, charges, and renewal fees, principal, notwithstanding such notice. *Godfrey v. Watson*, 3 Atk. 518. *Manlove v. Ball*, 2 Vern. 84. *Lacum v. Mertins*, 1 Serjt. Wils. 34, supra, 993.

(Q) In *Malkin Ex parte*, 2 Ves. & Be. 35, it was doubted whether the same person could act as attorney and scrivener in the same transaction; and it

for being intrusted with the security itself, it shall be presumed, that he was intrusted with a power over it, and with a power to receive the principal and interest; the rather, because the giving up of the bond, upon the payment of the money, is a discharge thereof; otherwise it is, if the obligee take away the bond; for, in that case, he hath no authority to receive the money.

If a scrivener is entrusted with the mortgage-deed (z), and not the bond, he hath only an authority to receive the interest, but not the principal; because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance; whereas the giving up a bond, is in law an extinguishment of the debt (zz).

Although a scrivener hath neither the custody of the mortgage, or the bond (a), yet if the mortgagee agree that the mortgagor shall pay the interest to the scrivener, the interest may be well paid to him as long as the mortgagee lives.

If a mortgagee, in such case, die (b), and his executor come to the scrivener, and receive interest of him, and at his hands, that becomes due after the death of the mortgagee, this is a good payment; and if, after such receipt, the scrivener break, the mortgagor shall not bear the loss; for it is the mortgagee that trusts the scrivener, and the executor comes into the agreement, and thereby renews it, supposing it was determined by the death of the mortgagee; but it is rather an agreement than an authority, and does not die with the party.

A mortgagee (c) refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender.

[1008]

He can receive interest only, if he have deed and not bond.

But by consen he may receive both, without deed or bond.

And mortgagee's executor, by receipt of interest from scrivener, confirms agreement.

[1009]

Tender suspends interest, if six months

(z) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

(zz) [As to the cancellation of the mortgage deed, see Co. Litt. 232 a. et antea, 202, of this edition.—Ed.]

(a) *Whitlock v. Waltham*, Salk.

158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. 1 Vern. 150. et vide *Martin v. Kingly*, Pre. Ch. 209.

(b) *Ibid.*

(c) *Sir John Austin v. Executors of Sir W. Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9.

was afterwards held, (ib. 175.) that a practising attorney, negotiating loans in the course of his business is not a money scrivener within the meaning of the bankrupt laws. S. C. fully reported, 2 Rose, 27. Yet the contrary was holden in *Hutchinson v. Gascoigne*, 1 Holt, 507, which seems to have been again contradicted by *Hurd v. Bridges*, 1 ib. 654. See also *Lewis Ex parte*, 2 Rose, 59. The question, however, in these cases appears to be, whether the person is by profession a scrivener as distinguished from the profession of an attorney, which he may be also, or whether he is an attorney, merely performing in his ordinary business some of the proper acts of a scrivener.

laws, but attorney not.

notice of pay-
ment of princi-
pal has been
given to mort-
gagee.

But then notice of paying off the mortgage must have been given to the mortgagee (d) at least *six calendar (dd) months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very day* on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord Hardwicke not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made (R).

(d) *Hix v. Ling*, before Lord Hardwicke, [S. C. 5 Supp. Vin. Abr. 261. *Church v. Bishop*, 2 Ves. 572. *Garforth v. Bradley*, ib. 678.—Ed.]

(dd) [The computation will be as above expressed, according to calendar, not lunar months. *Dyer v. Sweeting*, Willes Rep. 588.—Ed.]

Mortgagee may
require money
to be paid im-
mediately.

Six months' no-
tice superse-
ded by tender of
six months' in-
terest.

Tender must
always be to
person of mort-
gagee after con-
dition forfeited.

Mortgagee re-
quiring pay-
ment of money,
must be ready
with deeds at
time and place
appointed.

(R) This notice should specify both the time and place of payment. A form will be added in the Appendix, No. XXXII.

As to the mortgagee, it is clear he may call in his money at his pleasure, and may require it to be paid at as short a warning as he chooses to name; for it has never been held, that on a trial of ejectment, or on a bill to foreclose, the plaintiff should be nonsuited, or the bill dismissed, because the mortgagee did not give six months notice to pay the money in, or any other definitive notice. The reason is, because at law the estate is his own; and no notice is requisite to entitle a man to recover his own who stands in the situation of mortgagee; so that whenever the mortgagee calls for his money the mortgagor must pay it; and the mortgagee may at his pleasure proceed at law to recover the possession, or in equity to foreclose. But the mortgagor is not in the same situation, he cannot compel the mortgagee to take his money at a moment's warning; he must give the mortgagee six months' notice to recover it; or, which is the same thing, pay him six months' interest in advance; because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist, unless he will do equity: and the court holds it equitable that the mortgagor shall give six months' notice of paying in the money, to enable the mortgagee to provide another security for it. But when the mortgagee requires payment, all notice is out of the case: it is not notice, but a demand, which the mortgagee has a right to make, without any limitation of time whatever; and, consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day, and if he refuse to receive it he can no longer demand interest; for his demand of the money has made notice from the mortgagor wholly unnecessary. When the mortgagee has demanded payment of his money it must be brought to him personally, for though a place of re-payment is mentioned in the mortgage deed, yet the day of re-payment being passed, the mortgagee is not bound to attend there; and, therefore, it must be brought to him personally. It is thus upon a general demand, but he may give a special notice. The mortgagee, when he makes the demand, has a right to appoint a time and place for payment of the money, and then the mortgagor must attend at the time and place prefixed by the mortgagee to tender the money; otherwise interest will run on to the time of actual payment. 2 Cas. & Ops. 51.

But if the mortgagor comes with the money to the mortgagee, or to the time and place appointed, he has a right to require a production and delivery of the mortgage deed, [contra *Langford v. County of Salop*, Toth. 229, infra, 1068, 11th section of note there,] and to have it delivered up to him, as the production and delivery of the mortgage deed is the proper evidence to the mortgagor that the mortgagee has not assigned the mortgage to any other person, but has the right to receive the money. Suppose the mort-

And such a legal tender as will suspend the interest (e), when made to the mortgagee, will also bind his executors, or devisee.

But, in such case, it seems the plaintiff (f) ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that [he demanded it and] the mortgagor was not ready to pay it, in which case the interest must run on.

And, in general, a strict tender must be made (g), or the court cannot stop the interest; although cases may be where they would wish to do it; that of acting a more generous kind part, if the mortgagee had taken it, is not the rule that the court is to go by.

And where there was an open account between the mortgagor and the mortgagee (h), and several tenders were made of

Legal tender binds mortgagee's executor or devisee.
[1010]

Mortgagor's oath that his money was always ready.

To stop interest strict tender required.

Tender of money, deducting balance, not enough to stop interest.

(e) *Sir John Austin v. Executors of Sir W. Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9.

(f) *Lutton v. Rodd*, 2 Ch. Ca. 206. *Gyles v. Hall*, 2 P. Wms. 378, infra, 1015.

(g) 2 Ves. 372.

(h) *Garforth v. Bradley*, 3 Ves. 678, [S. C. antea, 741, of this edition, note (C).—Ed.]

gagee has received the money from a third person, and has assigned over and delivered the mortgage deed to the assignee, and then calls on the mortgagor, (who is ignorant of the assignment,) for the money, and he pays it without requiring to have the mortgage deed delivered up, most certainly the assignee can have no benefit of the mortgage, nor compel him to pay it over again, though the original mortgagee who received the money is become insolvent. But this is confined to the delivery of the mortgage deed; for the mortgagor has not a right to annex a condition to the payment, that the mortgagee shall execute an assignment; because it frequently happens, that a proper assignment or re-conveyance cannot be prepared without an inspection of the title deeds in the mortgagee's hands, and it is understood, that a mortgagee is not compellable to produce the title deeds before he has actually received his money; for otherwise, under pretence of repayment, the mortgagor may look into the title deeds with a view to discover faults and defeat the security; but the mortgage deed itself, which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must be always open to the inspection of the mortgagor, that he may know his right to redeem. It follows, therefore, that when the mortgagor comes to pay his money, either to the mortgagee himself or to his agent at a time and place appointed, he has a right to expect to find the mortgage deed there; and that it shall be ready to be delivered to him when the money is paid; and when that has been done, he has a right to call for the title deeds, to enable him to prepare a proper assignment, and to call on the mortgagee to execute it afterwards. The mortgagor is in no danger in paying the money upon receiving the mortgage deed without an assignment; because the mortgage and the receipt together will always shew what the debt is, and that the debt is satisfied; and from thenceforth the mortgagee will become a trustee for the mortgagor of the legal estate. 2 Cas. & Ops. 52.

In this place, it may be subjoined, that if a mortgagee has assigned the mortgage to trustees on trusts for the benefit of his family, the mortgagor on paying off the money will not be entitled to the custody of the trust deed, nor to an attested copy thereof at the trustees' expence. So, at least, the law is understood to be; and the trustees should be reminded most cautiously to refrain from entering into a personal covenant for the production of the trust deed.

Mortgage deed always open to mortgagor's inspection; contra of title deeds.

What if mortgagee has settled money on family trusts.

bank-notes is *at all events* a good tender; and perhaps there may be a great policy in evading such a decision, as the greatest credit such paper can acquire, is the voluntary and universal receipt of it as cash in all parts of the world. But although courts of justice have not yet decided bank notes to be a legal tender, the Court of King's Bench, in conformity with the opinion of mankind, have held, that if such notes are presented in payment, and no objection made to the receipt on that account, they are a *good tender*.

[1012]

Bank notes are cash, if accepted without objection as such.

This question occurred in the case of *Wright v. Reed* (j), which arose on an objection taken to the memorial of an annuity, under the 17th Geo. 3. c. 26, upon the ground, that part of the consideration was in money, and the rest in *bank-notes* of the Bank of England, whereas the whole consideration was *described* as *money* in the memorial. But the court were unanimously of opinion, that bank-notes were to all intents money, if accepted *without objection* as such, and on that ground held that the memorial was good.

Tender of bank notes should be accompanied with offer to turn them into money (T).

But Mr. Justice Buller observed, that although bank-notes were considered in this light in the Court of King's Bench, yet in a case on the other side of the hall, the Lord Chancellor once suggested a doubt, whether these kind of notes were money; therefore it is most prudent, in making a tender of them to a mortgagee, to offer to turn them into cash, which, if not required, clearly gives validity to the tender; for as the consequence of a refusal, if the tender be legal, is *penal* to the mortgagee, a court of equity would be inclined to seize upon any omission, by which a mortgagor, so circumstanced, might escape from the rigour of the law.

[1013]

Tender must be made by person interested.

A tender must be made by a person actually interested; and, accordingly, it was said by Croke to have been adjudged, Trin. 27 Eliz. that, where one tendered money upon a mortgage for

(j) *Wright v. Reed*, 3 T. R. 554, [S. C. 1 Selw. N. P. 348, 5th edition, and Bull. N. P. 34 a.—Ed.]
et vide *Miller v. Race*, 1 Burr. 452,

(T) The necessity of this precaution must be now superseded by the above definitive adjudication in the King's Bench. It is a precaution which may be productive of great inconvenience, and perhaps expence, in times of scarcity of cash; for if the mortgagee should close with the offer to turn the paper into specie, all the trouble which the procuration of the notes was intended to obviate, would be incurred, and if the mortgagee does not himself object to the legality of the tender, why, it may be asked, should the mortgagor to his own prejudice pointedly raise the objection for him?

an infant, who was not guardian, nor was to have any interest in the land, it was adjudged a void tender (*k*).

The above case is reported more at large in Owen (*l*), by the name of *Watkins v. Astwick*, and is thus stated: A man made a feoffment on condition, that if he, his heirs or executors, did pay one hundred pounds before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested I. S. that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. Clinch said, that if the jury had found that the son was of the age of seventeen years, the payment had been good. But by Wray, if a bond be upon condition, that the obligor or his heirs shall pay 100*l*. and the obligor dies, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years.

By guardian of infant, good, when.

[1014]

The money being a sum in gross (*m*), and collateral to the title of the land, the mortgagor must tender it to the person of the mortgagee, and it is not sufficient for him to tender it upon the land (*v*).

Tender must be made to person of mortgagee.

(*k*) *Watkins v. Ashwicke*, Cro. Eliz. 132. [S. C. 1 Leon. 34. Moor, 222, and Owen, 137. S. L. *Winter v. Loveday*, Owen, 34, and *Cropp's case*,

Godb. 39.—Ed.]

(*l*) Owen, 137.

(*m*) Co. Litt. 210 b. 2 Eq. Ca. Abr. 603. 34.

(U) Hence the necessity of appointing a certain place for payment of the money in the proviso for redemption. Lord Coke adds, "but if the mortgagee be out of the realm of England, the mortgagor is not bound to seek him, or to go out of the realm unto him; and for that the mortgagee is the cause that the mortgagor cannot tender the money, the mortgagor shall enter into the land, as if he had duly tendered it according to the condition." Co. Litt. 210. b, which principle may be attended with this consequence, that if the first mortgagee be out of the kingdom on the day of payment, and the mortgagor enters on the land, and after the day, assigns over to a second mortgagee who has no notice of the first mortgage; in such case it seems the first mortgagee would be postponed to the second, for the second has the legal estate and as much equity as the first, and then equity will not interfere. A proper precaution, therefore, for a mortgagee, going abroad before the day of payment, would be to appoint some person to receive the money at the time and place specified, of which appointment the mortgagor should have notice.

Mortgagee going abroad, should appoint person to receive money, if tendered at time.

Unless time and place be appointed in deed.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee (n), or be in any other place but in that comprised in the indenture, or *there* longer than the time specified therein.

[1015]
Or mortgagor in giving notice of repayment, specifies time and place.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus (o), where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at Lincoln's-Inn Hall, at a day and hour appointed therein, which accordingly was done; it was objected, that Lincoln's-Inn Hall was not named, in the proviso in the mortgage-deed, as the place for payment, and therefore that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to Oxford, where the mortgagee lived.

Tender at mortgagee's house, when good.

[1016]

In some cases, a tender at the house of the mortgagee will be sufficient (p). Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was [said to have been] made in the case of *Peckham v. Legay* (q).

Interest stops after tender and reasonable time to peruse reconveyance.

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop.

(n) Co. Litt. 211 b. 212.

(o) *Gyles v. Hall*, 2 P. Wms. 378.

(p) *Manning v. Burgess*, 1 Ch. Ca.

(q) Cited in *Manning v. Burgess*, 1 Ch. Ca. 29.

Thus (r), where a bill was brought in May, 1742, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal money only, for that the interest ought to determine in February, 1741, because he had given six months notice to pay it off, and had, on that day, tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money; the defendant swore, that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellor said, that the plaintiff, not having sent a draft of the assignment to the defendant any time before the money was tendered, as he ought to have done, was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a *week* with the defendant, that he might have had an opportunity to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his Lordship decreed the mortgage-money, with interest, to be paid within six months, or otherwise the plaintiff's bill to stand dismissed.

[1017]
Mortgagee allowed a week at least to peruse draft assignment of mortgage.

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled (s); therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

Interest not stopped by tender, if right to equity of redemption be in dispute.

The rate of interest, originally reserved upon a mortgage, may be altered at any time by a parol agreement, without writing; notwithstanding the rule, that a parol agreement ought not to be admitted to contradict the terms of an agreement contained in a deed, or any other agreement in writing; for such subsequent transaction will not be considered in law as a *contradiction*, or *alteration*, of the original agreement, but as a *new subsequent parol agreement*; and nothing is more clear in law than that a written agreement may be waved in part, or in the whole, or be varied in the terms of it, by a subsequent parol agreement, made upon a new and good consideration, if

Rate of interest may be varied by subsequent parol agreement.

[1019]

(r) *Willshire v. Smith*, 3 Atk. 90, [S. C. 9 Mod. 441.—Ed.]

(s) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34.

the subject-matter of the latter agreement doth not require that it should be in writing.

*Milton v.
Edgeworth.*

Thus, where Lord Milton (t), being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the Court of Exchequer in Ireland, in June, 1764, against Moore Edgeworth and Damer Edgeworth, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid the plaintiff by a short day, or that the defendants might be foreclosed, and the mortgaged premises sold, for payment of what should appear due.

[1020]

The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, John Damer, and the father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 *per cent.* to 6 *per cent.*

Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in November, 1771; when (upon reading an answer put in by the said John Damer, in 1758, to a bill, filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said defendant's father had told the said John Damer, "That the debts, affecting the estates mortgaged, were so great, that if John Damer did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit," and that Damer then said, "that if that should be the case, he would leave any reasonable abatement to his friend Ambrose Harding."—Whereby it appeared, that such conversation had passed between them; and that the said Ambrose Harding understood, that Damer had agreed to accept of 6*l.* *per cent.* interest upon the money so due to him on the said securities; and also upon reading other evidence) the court made an order, directing an issue to be tried at the next assizes, "whether there was any, and what agreement between John Damer, Esq. deceased, and Packington Edgeworth, deceased, at any, and at what time, for any, and what abatement of interest, on the principal sums due to the said John Damer?"

[1021]

*And issue will
be directed to
try existence of
such agreement.*

From this order, Lord Milton appealed to the House of Lords, and the principal objection urged by him against directing such issue, was, that considering the state of the evidence before the court, it was unjust to direct an issue; because the answer of Mr. Damer, which was read by the defendants at the hearing, denied any agreement between him and Packington Edgeworth, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from Harding's evidence, took away all ground for the court's interposing; whereas, by directing an issue, upon the trial of which Mr. Damer's answer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause.

But it was adjudged, that the order should be affirmed, with this addition, *viz.* that the plaintiff should be at liberty, at such trial, to read the answer of Damer.

[1022]

Interest due on *mortgage money*, which is in settlement (*u*), will not be considered as in the nature of rent, and consequently go with the mortgage; but if the tenant, under the settlement, die in the broken part of the quarter or half-year, the interest will be apportioned; and what is due from the last day of payment to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

Interest on mortgage money in settlement apportioned, in case of tenant for life's death.

The reason is (*x*), that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

Interest increases daily.

In this (*y*) a mortgage likewise differs from stock, for dividends upon stock are by the legislature made payable only half-yearly, and are in nature of rents, and consequently not liable to apportionment.

Interest and dividends distinguished.

[1023]

On the statute 12 Anne, stat. 2. c. 16, s. 1 (*z*), which enacts, "that all bonds and assurances for the payment of any principal, or money to be lent upon usury, whereupon there shall be reserved or *taken* above five pounds in the hundred, shall be utterly void;" parol evidence has been admitted to shew *usurious* interest *taken* by a mortgagee, though there was none reserved upon the face of the deed itself (*w*).

Usurious taking proveable by parol.

(*u*) *Edwards v. Countess of Warwick*, 2 P. Wms. 171. 199.—Ed.]

(*y*) *Wilson v. Harman*, 2 Ves. 672.

(*x*) *Wilson v. Harman*, 2 Ves. 672, [S. L. *Wade v. Wilson*, 1 East Rep.

(*z*) *Adlington v. Cann*, 3 Atk. 154, [S. C. *supra*, 957.—Ed.]

(*W*) And it has been decided, that the person who borrows the money on an usurious transaction will be a competent witness for the plaintiff in an *Borrower may prove usury.*

action for penalties against the lender; and whether he has, or has not, repaid the money lent, does not appear to make any essential difference, at least so far as his competency is affected; for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. *Abraham v. Bunn*, 4 Burr. 2251. *Smith v. Proger*, 7 T. R. 60. *Masters v. Drayton*, 2 T. R. 496.

Interest reduced in time of national calamity.

On the subject of this chapter the following observations remain to be made, 1st. Where by a general and national calamity nothing is made out of lands assigned for payment of interest, it has been held, that it ought not to run on during the time of such general distress. *Basil v. Acheson*, 15 Vin. Abr. 474. On this principle interest was moderated in *Porter and Hubbard's case*, 3 Ch. Rep. 79, on account of the badness of the times between the years 1642 and 1648; and in the *Earl of Derby's case* it is said to have been entirely taken away. 15 Vin. Abr. 474. The national calamity here alluded to, was in all probability, that which arose from the civil wars during the latter end of the reign of Charles I.

Taking bond for arrears, and giving receipt, no discharge of land.

2d. Taking a bond for an arrear of interest does not discharge the land, but operates only as a further security to the mortgagee. *Barrett v. Wells*, Fr. Ch. 131. Therefore where Mrs. Skinner, a mortgagee, having a great arrear of interest due upon her mortgage, in 1778, accepted a bond from William Mynd the bankrupt, for the payment thereof with interest, and at the same time indorsed upon the mortgage deed a receipt for all interest up to that time. The interest was held still secured by the mortgage, and after a poudage under the bankruptcy, Mrs. S. was held entitled to recover the deficiency on the estate. *Hardwicke v. Mynd*, 1 Anstr. 111. But if a mortgagee take a bond from a tenant for life, knowing him to be such for the arrears of interest, he cannot, as against the remainder-man charge the estate with the arrears. *Loftus v. Swift*, 2 Sch. & Lef. 642. S. C. ante, p. 292, of this edition, *in notis*.

Principal and interest distinct debts, though secured on same fund.

3d. The principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for, independently of the other, at the election of the party, and by different remedies. *Dickenson v. Harrison*, 4 Price, 282. But Wood, Baron, said, if part of the debt be sued for, it must be averred on the declaration, that the rest has been satisfied, *ib.* 287. Notwithstanding however that the principal and interest are separate debts, yet are they both, parts of the same fund, and alike secured on the credit of the land. *Shafto v. Shafto*, 2 P. Wms. 664, n. 1 Ves. 53. 3 Meriv. 566.

Money paid generally, applied in liquidation of interest.

4th. Seeing the mortgage is given as a security not only for the principal debt, but also for the interest, if any remains due; and that the interest is a recompence for the loss which the creditor sustains by the debtor's delaying to acquit the principal debt; the monies which may be raised from the fruits of the thing mortgaged, must be applied in the first place to the discharge of the interest, for the debtor must begin with indemnifying his creditor for the damage he has sustained by this delay. Thus the civil law enacts, that *cum et sortis nomine et usurarum aliquid debetur ab eo, qui sub pignoris pecuniam debet: quidquid ex venditione pignorum recipiatur primum usuris quas jam tunc deberi constat, deinde si quid superest sortis accepto ferendum est.* Dig de pignor, act ff. Lib. 35. Agreeably to this rule, we find it laid down in *Cham v. Bor*, 2 Freem. 261, that where one person is indebted to another for principal and interest, and pays him money generally, such payment shall be applied in sinking the interest before any part of it is applied in discharge of the principal. But if at the time of payment he that receives the money declares that he receives it on one account, and he that pays it declares that he pays it on another, the declaration of the payer will be preferred, for the rule of law is, *quicquid solvitur, solvitur secundum modum solventis*. This latter rule seems to have been uniformly received in our courts in England. It was fully acknowledged in *Anon. Cro. Eliz.* 68, pl. 18; *Pinnel's case*, 5 Co. 117, and *Prouse v. Worthing*, 2 Brownl. 107. So in *Bostock v. Bostock*, 8 Mod. 242, the court inclined to the opinion, that the sum then paid should be applied first in discharge of the interest, and then the residue in payment of so much of the principal. And where the question in dispute was respecting a judgment which had been given for principal and interest due on a bond, the court decreed, that whatever sum the creditor had received before the judgment was entered into, should go in discharge of the interest, and whatever he might have received after the judgment was given, should

go in the first place to discharge the interest, and then to sink the principal. *Crisp v. Black*, Finch. 89. Moreover it was in another case held, that where a man is indebted to another on two accounts, the one by mortgage and the other by simple contract, if he pays money generally, it will be taken to be paid in discharge of that debt which carries interest. See *postea*, 1120. But where two debts are consolidated, the one bearing interest and the other not, the general payment will be presumed to be made in liquidation of both debts proportionably. Thus where A. was indebted to B. by bond, and C. was bound as surety for him, and A. was likewise indebted to B. by simple contract in other money, and A. and B. came to an account of both debts, and stated them to amount to 84l.; and afterwards A. in satisfaction of this debt made over to his creditor certain goods of less value, without any declaration whether the produce of such goods was to be in part payment of the one debt or the other, C. the surety, insisted that it should be taken as paid on the bond, but B. the creditor would have it applied in satisfaction of the simple contract debt, for A. was insolvent, and therefore if it were not so applied he might lose his debt on simple contract, contending that he had a right to apply the general payment to what debt he pleased; and that it would be hard, where he had a just debt in law and equity, he should be expounded out of it by interpretation of a payment generally made: *Et per curiam*, this payment being pursuant to a precedent account of both debts, the payment shall be intended according to the account, namely, on both debts, and so shall be proportioned rateably on both debts; and an order of the Master of the Rolls to that effect was confirmed on the re-hearing. *Perrie v. Roberts*, 2 Ch. Ca. 83. S. C. 1 Vern. 34.

Two debts consolidated, one bearing interest, other not, general payment to be in equal proportions.

But on this principle it has been held, that where a purchaser pays part of his purchase money generally, to a creditor of the vendor by judgment or other security affecting the land, and also by bond or other security which does not affect the land, it will be considered as a payment in satisfaction of the judgment or other incumbrance which charges the estate. *Brett v. Marsh*, 1 Vern. 468. But this rule seems different at law; see *Goddard v. Cox*, 2 Stra. 1194.

General payment referred to judgment, in preference to bond.

5th. The devisee of an equity of redemption will not be entitled to have an arrear of interest upon a legacy from the mortgagee to the mortgagor, set off against the interest due on the mortgage. *Pettit v. Ellis*, 9 Ves. 563. So we have seen (*antea*, 299, of this edition, *s. v. in notis*) that a second mortgagee being also the tenant in possession, will not be allowed to set off his rent against the interest due on his mortgage, but that he must first pay it to the receiver, who will apply it in payment of interest on the first incumbrance, and return him the residue (if any) in payment or part payment of the interest on his second mortgage.

Set-off.

6th. Where a mortgagor becomes bankrupt, and the mortgage is inadequate to the payment of principal and interest, the mortgagee will be entitled to interest up to the date of the commission only. But if the mortgage be a sufficient security, the assignees will not be permitted to redeem without paying interest up to the time of redemption, or rather up to the time of payment of the principal. *Badger, Ex parte*, 4 Ves. 165. *Wardell, Ex parte*, 1 Cooke's Bank. Laws, 195. 7 Vin. Abr. 110. B. a. pl. 1 and 3. If the produce of the estate will be sufficient to pay the principal and interest beyond the date of the commission, but not to the time of the sale, the mortgagee will be entitled to the whole up to the day of redemption, but he will then have no right to prove any thing under the commission, 2 Chr. B. L. 278. In the case of a deposit as a security for a debt, no interest will be allowed, if the debt without the deposit would not have carried interest. *Haigh, Ex parte*, 11 Ves. 403.

Of interest where mortgagor is bankrupt.

OF THE METHOD OF ACCOUNTING.

Mortgagee no right to rents till in possession.

THE land upon a mortgage being generally left in the management of the mortgagor, and the conveyance thereof rather looked upon as a collateral security for the due payment of the money lent and interest, than as an actual alienation; the mortgagee is considered as having no right to meddle with the rents and profits, until after he has taken possession thereof (a) (A).

Mortgagor not accountable to mortgagee for by-gone rents.

[1025]

There is no instance of the mortgagor being obliged by the court to account to the mortgagee for the rents and profits for any of the years back, during which he hath been in possession; for if the interest be not paid, the mortgagee ought to take the legal remedy to get the possession himself (aa).

Not even where security was of expired life estate.

This principle is so strictly adhered to, that the court would not dispense with it even in the case of a security upon an estate for lives, which was become insufficient (b).

Mortgagee in possession must account.

If the mortgagee enters upon and takes possession of the estate (c), he becomes in the nature of a bailiff to the mortgagor (cc), and will be subject to account for the profits (B).

(a) Vide *Moss v. Gallimore*, supra, [174, of this edition, and] *Mead v. Orrery*, 3 Atk. 244. 2 ib. 107.

(aa) [See antea, 177, of this edition, in the text.—Ed.]

(b) *Coleman v. Duke of St. Alban's*, 3 Ves. 25.

(c) *Gould v. Tancred*, 2 Atk. 534.

(cc) [Lord C. J. Hale, assisting the Lord Keeper, thought it a great sore that mortgagees were but bailiffs to the mortgagor. *Roscarrick v. Barton*, 1 Ch. Ca. 220. S. C. infra, 1052.—Ed.]

Mortgagee not entitled to account of past rents from mortgagor.

(A) Admitting the decision of *Moss v. Gallimore* to be sound law, Lord Eldon, in a recent case said, he had often been surprised by the statement, that a mortgagor was receiving the rents for the mortgagee. This was one of those cases, which had led Lord Eldon to doubt whether Lord Mansfield was not sometimes applying as the doctrine of a court of equity what never had been so. Lord Eldon further observed, that in the instance of a bill filed to put a term out of the way which might be represented as in the nature of an equitable ejectment, the court would in some cases give an account of the past rents, but a mortgagee never could in the Court of Chancery make the mortgagor account for the rents for the time past. There was not an instance, his Lordship added, where a mortgagee had *per directum* called upon the mortgagor to account for the rents. The consequence was, that strictly speaking, it was incorrect to say that the mortgagor received the rents for the mortgagee; *Wilson, Ex parte*, 2 Ves. & B. 252. In confirmation of this view of the subject, it was held, in *Gresley v. Adderley*, 1 Swan. 579, that a mortgagee for a term which is expired, is not entitled to a retrospective account of the rents and profits which accrued due before the expiration of the term; see S. L. antea, p. 303, of this edition, *in notis*; s. ix. 3, et vide postea, 1198, et seq.

(B) In *Holman v. Vaux*, (Toth. 101. 230, p. 153, edition 1820,) the mortgagee in possession was decreed to account for the profits received and

So, if the mortgagee be put into immediate possession, and the profits of the estate evidently exceed the amount of the interest, the mortgagor may exhibit his bill for an account. *Notwithstanding agreement for retaining profits against interest.*

Thus, where M., seised of an estate for life (d), joined with her son, who had the inheritance, in a conveyance by a deed that was absolute of lands of 4*l. per annum*, and a profit out of some coal-mines, which, *communibus annis*, were worth nine pounds, to secure ninety pounds; and the vendee was immediately put into possession, but on a proviso, that if the son should pay the money at the end of ten years, the vendee should re-convey to him. On a bill brought to redeem, the only question was, whether the defendant should retain the profits in lieu of the interest, or should account for what he had received out of the estate? It was insisted for the vendee, that the mother, who had parted with the estate for life, had the most reason to complain, and that she was content the defendant should have the profits in lieu of the interest; that the son had a good bargain of it, for he had got to himself his mother's estate for life, and that it was in the nature of a Welsh mortgage, where the mortgagee is put into possession immediately, under a proviso to have a re-conveyance on payment of the principal money, in which case the profits always go against the interest; that this case was stronger, by reason that here the profits arising out of the coal-mines were more uncertain than the profits of lands. But the Master of the Rolls was of opinion, that the profits being 13*l. per annum*, it was altogether unjust and unreasonable that the same should go in lieu of the interest of 90*l.*; and that even in Welsh mortgages, if the value was excessive, the court would decree an account, notwithstanding there might be an agreement for retaining the profits against the interest; and a re-conveyance was decreed

[1026]

[1027]

(d) *Fulthorpe v. Foster*, 1 Vern. 476.

for the use of those profits; but this is not the present method of calculating the account; see *Davis v. May*, Coop. Rep. 239. S. C. postea, 1038, *in notis*.

The account is taken before a Master in Chancery, and it is his duty where the parties who might resist the claim do not attend, to take the account with as much care as if they did; and even with more jealousy; for when the parties do appear, it is to be expected that they will attend to their own business. A decree taken *ex parte*, is taken at the peril of the party who obtains it; if he cannot support it by his pleadings and proofs, it is not a judgment pronounced by the court, but is the act of the party conceiving what the judgment of the court would be if the other party had appeared. The same may be said of an account made by the Master attended by one party only; and Lord Redesdale, in a late case, expressed his fears that mortgage accounts were too often taken where one side only was present. *Carew v. Johnstone*, 2 Sch. & Lef. 330.

Duty of Master in taking ex parte account.

on payment of what should appear due, discounting the profits received (c).

Mortgagee in possession allowed nothing for trouble, but he may employ bailiff.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains (e); but if they employ a skilful bailiff, they will be allowed such sums as they have paid him; for a man is not bound to be his own bailiff (d).

Agreement that mortgagee shall be allowed for trouble, inoperative.

And though there be a private agreement between the mortgagor and the mortgagee (f), for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and interest.

Mortgagee in possession assigning without mortgagor's consent, answerable for future rents.

[1028]

If a mortgagee in possession assign over his mortgage, without assent of the mortgagor, to an insolvent person, the mortgagee will be bound to answer the profits, both before and after the assignment, though assigned only for his own debt (g); for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to an insolvent person. But *quære*, if the mortgagor conceal himself, so that

(e) *Bonithon v. Hockmore*, 1 Vern. 316. 3 Atk. 518.

(g) 1 Eq. Ca. Abr. 328, pl. 2. 2 Ch. Ca. 3. 3 Bac. Abr. 658.

(f) *French v. Baron*, 2 Atk. 120.

No annual rests in Welsh mortgages. Semb. But mortgagee must account for surplus in his hands.

(C) This was not exactly the case of a Welsh mortgage, for *there* the excess of rent beyond the interest is carried to a liquidation of the principal; but from the above expression of the court it may be inferred, that after a Welsh mortgagee has been paid his principal, interest and costs, he will be compelled to account for by-gone rents, though it might have been the case of a life-estate, which has determined by the extinction of the life. But it is apprehended, that the court would not direct annual rests in these cases according to the rule laid down, *infra*, p. 1038.

Account of mortgagee and receiver distinguished.

(D) It has long been determined in Chancery, that though a mortgagee, may stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, he cannot stipulate for any advantage to accrue to himself beyond the interest, and though it seems to make little difference to the mortgagor who is receiver, yet this court considers it as tending to usury and oppression, and a collateral advantage, which a man contracting for a loan of money shall not make. So, if a mortgagee stipulates to enter and take possession as trustee, and do a variety of acts which he ought to do, whether he stipulates or not, he not only shall not have any advantage from it, but his stipulating for it might perhaps affect his right to the money lent. Upon the general rule also, independent of contract, a mortgagee or trustee cannot charge any thing beyond what he paid to the person for whose estate he is accountable. *Chambers v. Goldwin*, 9 Ves. 272; *et vide antea*, 296, 7, of this edition, for cases where a mortgagee will be allowed in account, the salary of a receiver or collector of his own appointing. In *Trimleston v. Hamill*, 1 Ball & Bea. 377, this distinction was taken by Lord Manners, that a creditor in possession under a power of attorney may account as a receiver, which will entitle him to a salary for his trouble; but if such creditor take an assignment of a mortgage as a further security, he must thenceforth account as a mortgagee.—A trustee, though he acts, is not to be charged as a mortgagee for what he might have received, but only for his actual receipts; for he might have moved for a receiver. *Harvard v. Webster*, Sel. Ca. Ch. 53.

he cannot be served with a *subpoena* to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment? (gg)

A mortgagee will not be obliged to account according to the value of the lands (*h*), viz. he will not be bound by any proof that the land was worth so much, unless it can likewise be proved, that he actually made that sum of it, or might have done, had he not been guilty of fraud or wilful default; as, if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it; for it is the *laches* of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money, and when it doth, he is only a bailiff for what he doth actually receive, but is not bound to the trouble and pains of making the most of what is another's.

If the mortgagor make proof that the estate was let at such a price whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do, as being let by him (*i*) (F).

But, if the mortgagee enter upon the estate, and thereby keep other creditors [*read* incumbrancers] out, he will be charged with all the profits he hath, or might have received after this entry (*k*). Thus, where a mortgagee had obtained judgment in ejectment, and entered on the mortgaged estates,

(gg) [See as to the service of the *subpoena*, infra, 1059, in *notis*.—Ed.]

(A) *Anon.* 1 Vern. 45. 1 Ch. Ca. 258. 1 Eq. Ca. Abr. 328. 1 Vern. 476. 3 Bac. Abr. 657, 8.

(i) *Blacklock v. Barnes*, Sel. Ca. Ch. 53.

(k) *Coppring v. Cooke*, 1 Vern. 270.

Bentham v. Huincourt, Pre. Ch. 30, [S. C. antea, p. 677, postea, 1006, 7.] 3 Bac. Abr. 658. [The above are the usual words of the decree, see *Bulstrode v. Bradley*, infra, p. 1031, and *Harvey v. Tebbutt*, 1 Jac. & Walk. 203.—Ed.]

Mortgagee in possession accountable for what he has received only; but answerable for fraud and wilful neglect (z).

[1029]

Mortgagee charged according to mortgagor's proof of rent.

Mortgagee in possession charged with what he might have received as against other incumbrancers (g).

(E) The above is the general rule, the position in the next paragraph but one forms an exception. Similar doctrine prevailed in the civil law. Thus, in the Pandects, *contractus quidam dolum malum duntaxat recipiunt; quidam et dolum et culpam—dolum et culpam mandatum, commodatum, venditum pignori acceptum*, (lib. xxiii. de reg. jur.). *Venit autem in hac actione et dolum et culpa, ut in commodato, venit et custodia*, ib. lib. xiii. de pign. act. But not only would the creditor be answerable for the losses and damages which he might have caused by his own act and deed; he was likewise accountable for what happened through any negligence or fault which a careful and circumspect person would not readily have been guilty of. *Ea igitur quæ diligens paterfamilias in suis rebus præstare solet, à creditore exiguntur*, eod. lib. xiv.; and again, lib. xxiv. in pignoratitio judicio venit, et si res pignori datas malè tractavit creditor vel servos debilitavit.

(F) If a mortgagee enter into possession of the lands, he will be charged with the utmost value they are proved to be worth; but if he enter into receipt of the rents he will be obliged to account after the rate of the rent reserved only. *Trinleston v. Hamill*, 1 Ball & Bea. 385.

(G) See similar law, antea, 292 and 1006, of this edition, in the notes and text. The general rule is mentioned above in the text. When

Coincidence of English and civil law.

and thereby prevented other creditors that had subsequent securities from entering, and yet permitted the mortgagor to take the profits; on bill by the other creditors to redeem him, the

a purchase is completed the vendee is entitled to the rents and profits of the estate till possession is given, and the vendor, to his purchase money, with interest; and if, by the neglect of the vendor no rents and profits have been received, he will be liable for what he might have received, unless the purchaser has taken possession. *Acland v. Gaisford*, 2 Madd. Rep. 28.

Mortgagee in possession not entangled with minute enquiries, whether other persons would not have given more than his tenants.

In *Hughes v. Williams*, 12 Ves. 493, exceptions were taken by a mortgagor to a report, 1st. That the Master had charged the plaintiff, a mortgagee in possession personally, and by a receiver under his own appointment, with the rents actually received, whereas he ought to have been charged with the improved rents, at which the estate had since been let by a receiver appointed by the court, and which ought to have been obtained by the plaintiff or his receiver but for their wilful neglect or default; and 2d. That the Master had allowed the plaintiff the sum of 68*l.* for opening a slate quarry, when the only benefit accruing to the estate thereby was the sum of 2*l.* charged to the plaintiff's account, as the produce of the slates. The defendant was out of possession long before the plaintiff entered: prior mortgagees having been in possession, whom he paid to prevent foreclosure. Lord Erskine, in delivering his judgment, would not say that to charge a mortgagee in possession actual fraud was necessary; it was sufficient if there were plain, obvious, and gross negligence in the mortgagee, by not making use of facts within his knowledge: so as to give the mortgagor the full benefit of them;—as if the mortgagee had turned out a sufficient tenant, and having notice that the estate was under-let took a new tenant; another person offering more:—an offer however not to be accepted rashly. But the present case, his Lordship said, did not furnish even that ground; for, with the exception of a proposition to give 7*l.* a-year for one tenement instead of 5*l.* a-year, there was no proof of any proposal for an increase. A reason also was assigned for not accepting the proposal in that instance; namely, that the tenant was in arrear: and the plaintiff was apprehensive of losing that arrear. Another circumstance was, that the mortgagor if he knew the estate was under-let ought to have given notice to the mortgagee, and to have afforded his advice and aid for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but during a whole period of sixteen years, while the mortgagor was out of possession, he never stated, that the estate was not managed as it might be. Could the mortgagor then (Lord Erskine asked) lie by, not giving notice that a greater rent might be made, and come afterwards by way of penal enquiry, to charge the mortgagee with the effect of his own negligence. The principle was, as stated by the Solicitor-General, that it would be dangerous to say the mortgagee was not answerable except for fraud, for if such gross negligence could be shewn as came up to the description of wilful default, he ought to be answerable for it.

Mortgagee answerable for fraud and gross negligence.

Not allowed in account for speculation and adventure.

But Lord Erskine determined the first exception upon the principle, that a mortgagee, taking possession, was to take the fair rents and profits, and was not bound to engage in adventures and speculations for the benefit of the mortgagor; but he was liable only for wilful default, of which, in this instance, there was no pretence: the mortgagor not having even communicated that he had any contemplation of improvement or better tenants. It would be most dangerous to entangle mortgagees in minute enquiries, whether some person would have given more; which was never communicated. Upon the same principle on which his Lordship determined the first exception in favour of the mortgagee, he must determine the other exception against him. The principle was the safety of mortgagees. The line could not be drawn. How could it be ascertained, that the mortgagor would want a slate quarry? The amount was in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must be held to speculate at

As for opening unproductive mine or quarry.

court ordered, that the mortgagee should be charged with all the profits he had, or might have received after his entry. [1030]

But he will not be obliged to account for profits which he received, or might have received previous to the commencement and notice of such subsequent incumbrances; for until then his negligence doth no injury (*l*). Thus, where a mortgage was made of leasehold estates, and the mortgagee having possession by attornment of tenants, had permitted the mortgagor to receive the rents, and the plaintiff, who was the second mortgagee, was on his bill admitted to a redemption, on payment of what should appear due on the first mortgage; the question was, whether the mortgagee, having had possession, ought not to be charged with the rent, which he might have received but had neglected? *Et per curiam*, he ought to be charged with the rent, by whomsoever it has been received, after the second mortgage made; but what has been received before the second mortgage, he ought not to be charged with.

Provided he have notice of their claims (H).

And, if a mortgagee permit the mortgagor to make use of his incumbrance to keep out other creditors, he will be charged with the profits from the time that they would have had a remedy, had it not been for his interposition; for equity will not suffer a man to make use of his securities to protect a debtor from the just demands of his creditors (*m*).

Mortgagee not allowed to use his security to prejudice other creditors.

[1031]

Thus, where one having made a mortgage of his estate, became a bankrupt, and the assignees of the statute brought an

Mortgagee refusing to enter, charged with profits, when (i).

- (*l*) *Maddocks v. Wren*, 2 Ch. Rep. 267. 3 Bac. Abr. 658, [S. C. cited ante, 292, of this edition, in *notis*.
109.
(*m*) *Chapman v. Tanner*, 1 Vern. —Ed.]

his own hazard. The first exception was consequently over-ruled, and the second allowed. 12 Ves. 496.

Where a mortgagee is in possession without notice from the second mortgagee, he may pay the surplus rents over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, cannot have an account of the by-gone rents; for he could not have such account against the mortgagor, and, therefore, not against the first mortgagee. After notice given, the first mortgagee is answerable to the second; but the court cannot try upon affidavits whether the rents have been properly applied, or whether the estate has been properly managed. The course is, to decree a redemption charging the first mortgagee with all that he has received [and applied to his own use], or with all that he might have received, had it not been for his own wilful default. *Berney v. Sewell*, 1 Jac. & Walk. 630.

Second mortgagee should give first mortgagee notice of his incumbrance to charge him with surplus rents.

(*H*) The case cited in support of this position does not appear to have turned on the point of notice. It proves merely that the mortgagee in possession will not be obliged to account according to the rigid rule of what he might have received in the interval between the time of his entry into possession, and the making of a second mortgage, but the rule in the text is uniformly acknowledged as good law.

(*I*) See also another case, *infra*, p. 1032, where he was charged with the profits for refusing or delaying to take possession after he had procured judgment in ejectment.

ejectment for the recovery of the lands comprized in the mortgage; the mortgagee having refused to enter, and suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage, it was decreed, that he should be charged with the profits from the time of the ejectment delivered.

Combinations between tenant and mortgagee, discouraged.

[1032]

Court will order mortgagee having procured judgment in ejectment to take possession (L).

Nor shall a mortgagee, being in combination with the tenant in possession, who refuses to pay his rent, suffer the tenant to make use of his mortgage to cover himself from legal process taken out by the mortgagor, to evict him out of possession (K).

Thus, where G., who was a mortgagee under B., had brought an ejectment and recovered judgment against an estate, of which H. was in possession, by virtue of a lease for three years, but for which H. paid no rent, being insolvent (N); and G. being in combination with H. (who was accountable to B. for eighteen thousand pounds) refused to take out execution, and B. could not eject H. by reason of G.'s judgment; it was moved, that G. might be compelled to take out execution, and receive the profits in discharge of his debt. But it was objected on his part, that no order had ever been made to compel a mortgagee to take out execution, whether he would or not; for it might involve him in a suit, and would make him, *volens nolens*, bailiff to the mortgagor; whereas, a mortgagee, who acted discreetly, would not enter before he had foreclosed the equity of redemption. To which the counsel for the mortgagor replied, that they would not compel G. to enter; but, in case he did not choose to receive the profits, they desired the rent might be brought into court, which the court held to be reasonable; and it was ordered, that, unless G. took out execution before

(N) *Duke of Buckingham v. Sir R. Gayer*, 1 Vern. 258.

(K) See, as to this, *antea*, 173, of this edition, note (B). The word "mortgagor," in the placitum to that note, should be "mortgagee," but the subject of the note will, it is conceived, apply to legal process by the mortgagor, as well as to legal process against the tenant by the mortgagee.

Mortgagees not compellable to take possession.

(L) In *Penryn v. Hughes*, 5 Ves. 106, the Master of the Rolls said, a mortgagee could not be compelled to take possession; for he would thereby subject himself to an account which a court of equity would never force upon him. He might file a bill for a foreclosure without taking possession. But if he did take possession, he would be bound to apply all the rents and profits as the court should distribute them among the several persons claiming interests subject to his mortgage. To this general rule, the case in the text must be read as an exception; but that case may support this doctrine, viz. that the court will not allow the mortgagee to vacillate between two opinions, so as to pursue the means of procuring possession to-day and discontinue them to-morrow; and, in fact, the court did not in the case of *Buckingham v. Gayer* force the mortgagee into possession; for by his own voluntary act he obtained a judgment in ejectment, which has all the effect of legal possession, he was then merely compelled to take actual possession or to account as having taken such possession, and *this*, very reasonably, to prevent an abeyance of the immediate occupancy.

the end of the term, he should be answerable for the profits, as in case of wilful default.

It was held by the court to be the daily practice, that if a mortgagee assign over his mortgage, yet he must be made a party in a bill of redemption, that he may account for what profits he hath received in his time (o) (M).

[1033]

Mortgagee must be party to bill for redemption, though he has assigned.

Where there are several mortgages, an account stated between the first mortgagee and the mortgagor will bind the rest, if there be no fraud or collusion (p). Thus, where the mortgagee sued the mortgagor to pay, or be foreclosed of redemption, an account was directed and settled before a Master; and then a subsequent mortgagee, whose mortgage was made before the former bill was exhibited, sued the first mortgagee and mortgagor to have a new account, supposing the former account to be false, and made by consent and fraud, but did not insist on any particulars, as in such case he ought to have done. The Lord Chancellor declared, that the account should bind the second mortgagee, without farther examination, if the fraud and collusion were answered; for the first mortgagee did all that he could, and was not bound to seek after the second mortgagee; for then it would be in the power of the mortgagor to make the assurance uncertain and endless to the mortgagee. It should suffice to deny the fraud and collusion.

Account between mortgagor and first mortgagee, settled by Master, binding on subsequent mortgagee, if no collusion.

[1034]

But the account between the mortgagee and assignee will not conclude the mortgagor (q); but it will be referred to the

Account between mortgagee and as-

(o) *Anne, in the Duchy*, 2 Eq. Ca. Abr. 594, pl. 3, [S. L. *Pearson v. Pulley*, 1 Ch. Ca. 102.—Ed.]

47, 8. 1 Eq. Ca. Abr. 12, pl. 7, [et vide *Crisp v. Fleath*, 7 Vin. Abr. 52. pl. 2.—Ed.]

(p) *Needler v. Deeble*, 1 Ch. Ca. 299. *Williams v. Day*, 2 lb. 32. 2 Bac. Abr. 659. *Sherman v. Cox*, 3 Ch. Rep.

(q) 1 Ch. Ca. 68, [S. L. *antea*, p. 154 and 966, of this edition.—Ed.]

(M) Previously to the late case of *Chambers v. Goldwin*, so frequently referred to, this rule seems to have obtained, viz. that if the mortgagee assigned over without the assent of the mortgagor, the mortgagee would then have been a necessary party to a bill to redeem, to account for the profits received in his time; but if the mortgagee assigned without the mortgagor's consent, it would then have been unnecessary to bring him before the court. The case above alluded to, has over-ruled this distinction, as also the law in the text, without, however, any particular reference to the case in the *Duchy*, or the subject in general. Lord Eldon's sweeping observations were the following:—"It is clear that the assignee of a mortgage, provided the transaction be not sanctioned by the mortgagor, will be liable to have the account taken from beginning to end. It has been pressed, that if there have been twenty mesne assignments all those parties must be brought before the court. That is not necessary: for, where there has been an assignment without the previous authority of the mortgagor, or his declaration that so much is due, it is enough to make that man a party, who has contracted to stand in the place of the original mortgagee and all assignees, till the title was got in by himself." *Chambers v. Goldwin*, 9 Ves. 269. The same law has been advanced, *antea*, 403, of this edition, in the text.

Mortgages having assigned, not a necessary party to bill of redemption.

signee not binding on mortgagor (N).

Account settled with privy of tenant for life, binding on contingent remainder-man; but he may when in esse surcharge and falsify (O).

Master to see what was really due on the making the assignment, and what money was *actually* paid thereon.

An account on a bill to redeem or foreclose (r), taken in a cause, in which tenant for life of the equity of redemption is party, and when no other person is entitled, will be binding on any contingent remainder-man, when his title afterwards vests; nor shall he open it, unless fraud or errors are shewn therein; for thereby accounts upon mortgages, to which all

(r) *Allen v. Papworth*, 1 Ves. 164.

Mortgagor may acquiesce in assignee's account, yet try questions of error with mortgagor.

(N) But the mortgagor may subsequently recognise the assignee, as also acquiesce in the account, which will prevent him from disputing it with the assignee; nevertheless, he may try the question of error with the original mortgagor, if the assignment has been made without his (the mortgagor's) assent; at least, so it may be inferred from Lord Eldon's observations in 9 Ves. 270, who there stated, Lord Alvanley to agree with him in this, that if a mortgagor permits an assignee to pay the assignor a sum of money, which he, with the knowledge of the mortgagor, represents to be due, and more particularly if he permits it from day to day, and from year to year, he cannot quarrel with that representation, subsequently approved; which subsequent approbation has the same effect as if previous; but he is bound to institute his quarrel with the person who assigned, and with his privy received and retained the money a great many years before the bill filed.

Old accounts not to be unravelled.

(O) But he cannot, it is conceived, open or revive the equity of redemption if there be no fraud in the case, (*Lyne v. Willis*, postea, 1059); and it is observable, that in *Gray v. Minnethorpe*, Lord Rosslyn held, that an old account could not be unravelled, though settled on an erroneous principle. 3 Ves. 103. The true rule was perhaps advanced by Lord Alvanley, M. R. in *Chambers v. Goldwin*, 5 Ves. 837, that "a strong ground is necessary to set aside a settled account; and to surcharge and falsify, error must be charged by the bill." His Lordship in that case would not allow the account to be unravelled beyond fifteen years, that being a time when a new arrangement was entered into, and so much for principal and interest calculated up to that period. This decree was affirmed on appeal to the Lord Chancellor (Eldon) 9 Ves. 254; S. C. 1 Smith's Rep. 252, on which occasion the latter noble personage laid down these general principles:—

Strong ground necessary to set aside account.

Account settled not to be set aside but for fraud, or surcharged and falsified, but for error.

The law, as well as the act of the parties, provides that accounts settled shall not be set aside but for fraud; or surcharged and falsified but for error. In support of the charges in the bill [in this case of *Chambers v. Goldwin*] that in settling the accounts, undue advantage was taken of the mortgagor's distressed situation, &c. there is no evidence of distress, unless the deeds themselves are to be considered so, which is going much farther than the court has ever gone, or is warranted in going. The charge of threats rests entirely in allegation not sustained by proof. As to the charge that the defendant [Goldwin, who was the assignee of the mortgage, one of the executors of the mortgagor, and an attorney] caused the accounts to be transmitted and enrolled in Jamaica, in order to prevent their being opened, that, which is a circumstance to prove the absence of fraud, would thus be made a circumstance to prove the existence of it. It is clear, if error can be shewn, this court will correct an account, as far as it is erroneous; whether there is a stipulation for it or not. With reference to the material charge, that there are in the accounts, pretended to be settled, several manifest errors and overcharges, and particularly that 6 per cent. upon the gross profits and produce is charged for the management, though the defendant now resides, and for several years past has resided in England, and though the accounts contain various charges, as payments to attorneys, &c. the bill must either seek to set aside those accounts, as imputing the settlement of them to fraud; or, letting them stand, must seek to surcharge and falsify them; in which case, if they are to be considered settled and signed, the rule is fixed, upon the most

who can claim the equity of redemption are parties, would often be infinite. But if a reasonable objection be made against such account, the court will so far open it. But the court will only give leave to surcharge and falsify the account; which often happens upon settlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being; a child afterwards coming *in esse*, shall, if no fraud, only have liberty to surcharge and falsify. [1035]

And where a man made a mortgage, and, after a forfeiture for non-payment of the mortgage money, married and conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure; and afterwards became a bankrupt (s); and the commissioners assigned the equity of redemption in trust for the creditors, and the assignees stated an account with the mortgagee: The jointress brought her bill to be relieved against this account, alleging, that it was not fairly stated, but that the assignees by combination with the mortgagee had allowed more money than was really due on the mortgage; the defendant pleaded this stated account. *Et per* Lord Keeper, the assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband; and the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account. - [1036]

An assignee, after several assignments, will not be obliged to account for profits before his own time (t). Thus, where on a bill to redeem a mortgage made in 1632, it was insisted by

(s) *Knight v. Bunfield*, 1 Vern. 179.

(t) *Pearson v. Pulley*, 1 Ch. Ca. 102.

obvious principle, that some error must be charged; as it is impossible for the defendant to defend himself if under a general charge, not specifying any error, the plaintiff may come at the hearing with proof of those errors, of which the defendant has heard nothing. The point was decided upon that ground by Lord Thurlow, upon my objection in *Taylor v. Haylin*, 2 Bro. C. C. 210; that if accounts are impeached on the ground of error, you must specify some or one error, and prove that; and that is a ground to surcharge and falsify. I do not recollect a case in which the Court has gone the length of declaring any thing error, unless the declaration has been confined to the subject of that, which is alledged to be error upon the pleadings. That would be attended with great inconvenience; for it is very possible, there might be cases in which the opinion of the court might be clear at the hearing that there was error; and yet, if it was distinctly put in issue, the court might be satisfied, that transactions had taken place, upon which it was impossible to consider it error, 9 Ves. 261.

For purpose of falsifying account, some specific error must be charged.

fore his own
time (P).

[1037]

Mortgagee allowed in account all costs in supporting mortgage against attempts by mortgagor to overthrow it.

the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken, but so far only as went in discount of his money, *not* for the surplusage. So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641 (*u*); afterwards, he who had the extent, by virtue of the dismissal, sold the premises to the defendant, and the plaintiff having since bought the equity of redemption, came to redeem; the court, notwithstanding the dismissal and length of time, ordered an account from the [time of the] purchase [only], not from any time before, but till then the profits [were directed] to go against the interest.

Where a mortgagor, having been defeated, after a special verdict and great agitation at law, in his endeavour to overthrow the mortgage by a supposed entail, exhibited a bill to redeem (*x*); the mortgagee having sworn, that he paid 120*l.* in defending his mortgage at law, although he had but 60*l.* costs allowed him there; the court determined that he should not be held down to the taxation at law, but should, upon the account, be allowed all that he had laid out or expended; and the mortgagee, fearing his mortgage would have been defeated at law, having got administration, as principal creditor, in the Spiritual Court, he was allowed the costs expended *there* also (*q*).

(*u*) *Cloberry v. Lymonds*, 2 Ch. Rep. 392.

(*x*) *Ramsden v. Langley*, 2 Vern.

536. [See the same case and point, *supra*, 336, of this edition, in the text.—Ed.]

Mortgagee allowed in account expences, repairs, fines, and improvements, but he should first inform mortgagor of their necessity.

(P) Sed quære now, and see *antea*, p. 953, of this edition, note (M).

(Q) It may be proper in this place to add, that the mortgagee in accounting will be allowed all costs of suit, renewal fines, sums expended for necessary repairs and lasting improvements, or in performing the covenants of the mortgagor with third persons, as in carrying into effect a covenant to build; so he will be allowed all money expended in defence of the mortgagor's title, and all sums paid for copyhold admissions, heriots, or fines, with interest for the same respectively, after the rate of the principal, provided the court doth not direct otherwise. *Degelder v. Depeister*, Finch, 207. *Elton v. Elton*, 3 Atk. 508. *Godfrey v. Watson*, ib. 518. *Lomax v. Hide*, 2 Vern. 185. *Manlore v. Ball*, 2 Vern. 84. *Lacom v. Mertins*, 3 Atk. 4. *Woolley v. Drage*, 2 Anstr. 551. *Lyster v. Dolland*, 1 Ves. jun. 436. *Hardy v. Reeves*, 4 ib. 482. *Quarrell v. Beckford*, 1 Madd. Rep. 281. *Sykes, Ex parte*, 1 Buck B. C. 349. *Brightwen, Ex parte*, 1 Swan. 3. et vide *antea*, 993, and *postea*, 1068, where a mortgagee thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he was allowed such expensiture, but he was directed to account for wilful spoils and wastes. *Thorne v. Newman*, Finch, 38; and as a general rule it may be laid down, that where a

An account taken by a Master upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify (y) (R).

Account binding on infant, when.

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal (z) (s). But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account) the Master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the court ever laid it down as an invariable rule, that the Master must always, in taking such account, make annual rests (T).

[1038]

Annual rests in account; and balances, if excessive, applied to sink principal.

(y) *Badham v. Odell*, 4 Bro. P. C. 447. S. C. supra.

[et vide *S. L. Bradshaw v. Ashley*, 4 Bro. P. C. 505, Tomlins' edit.—Ed.]

(z) *Gould v. Tancred*, 2 Atk. 534,

mortgagee in possession, finds it absolutely necessary for the protection of the estate to incur extraordinary expenses; he will be allowed them; particularly if in accounts regularly furnished by him for the satisfaction of the mortgagor, the latter doth not from time to time object to the extraordinary charges; for they are then to be considered as incurred and paid with the mortgagor's approbation; but without the mortgagor's acquiescence, Lord Manners, in a recent case said, he should have felt considerable difficulty in allowing charges for preservation of the property; for that even in the case of absolute necessity, it was incumbent on the mortgagee to apprise the mortgagor, as soon as possible, of the extraordinary expenditure. *Trimleston v. Hamill*, 1 Ball & Bea. 385. It should be added that a mortgagee will not be bound to keep up buildings in as good repair as he found them, if the length of time will account for their being dilapidated. *Russell v. Smithers*, 1 Anstr. 96.

By the Roman law, if a mortgagee had been at any necessary charges for the preservation of the pledge, whether he was in possession of it or not, the debtor was bound to reimburse him, although the thing were no longer in being, as if a house repaired by the mortgagee had been carried away by a flood, or burnt down, without his fault; and if the pledge were still existing, and in the custody of the mortgagee, he was allowed to detain it for expenses of this kind; for they were considered as augmenting the debt, and as forming a part of it. Cod. lib. 6. dig. lib. 8. *Si necessarius impensas*, &c. et vide Vin. lib. 38, *de rei vind.*

Repairs allowed by Roman law, whether pledge in existence or not.

(R) It is incumbent, therefore, both on the mortgagor and mortgagee to object to the defects in an account before a master, that it may be made perfect before him; for the court will not afterwards intermeddle therewith. See Harrison's Ch. Pr. 480.

(S) The object of directing annual rests is to give compound interest. *Raphael v. Boehm*, 11 Ves. 92; and in *Quarrell v. Beckford*, 1 Madd. Rep. 283, it was said by Sir Thomas Plumer, V. C. that if compound interest be given, on one side it ought to be allowed on the other, for the benefit should be equal, and as the defendant in the case in question would not agree to give compound interest, neither party could expect more than simple interest.

Object of annual rests to give compound interest.

(T) On a decree against a mortgagee in possession to account, rests cannot be made by a master unless directed by the decree. In *Yutes v. Hamblly*, 2d May, 1815, the decree appears from the register book to have been, "that an account be taken of what shall be coming due on

Annual rests cannot be made, unless ordered by decree.

Mortgagee answerable for what he receives after decree for account.

It is the constant practice of the Court of Chancery, in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it

Annual rests directed only on special case, and then for whole time.

account of rents and profits, to be applied, in the first place, in payment of interest and principal, and in sinking the principal, and the Master to make annual rests, and in taking such account is to make all just allowances." This was said to be the proper form of a decree where rests are to be made, 1 Madd. Rep. 14. In another case, a bill was filed to redeem a mortgage, and the usual decree was made against the mortgagee, who was in possession, viz. that an account be taken of what was due for principal, interest, and costs, and of what had been, or might, have been received by rents and profits; a motion was made, that under this decree the Master should be directed to make rests; Sir T. Plumer, V. C. said, he had upon enquiry, found a difference of practice amongst Masters, some made rests without any specific direction in the decree for that purpose, and some did not, but merely totalized the principal, interest, and costs, and the rents and profits. His Honour added, that the Master was not at liberty to make rests, unless directed to do so by the decree. *Webber v. Hunt*, 1 Madd. Rep. 111.

Mode of calculating account.

It is not usual for a mortgagee in possession to render annual accounts. The mortgagor lies by, and when he conceives the debt is satisfied, he calls on the mortgagee for a final adjustment, per Lord Manners, C. in *Trimleston v. Hamill*, 1 Ball & Bea. 388. The consequence is, that decrees of account do not in general direct annual rests, but simple interest is calculated, against which, and the principal and costs, the total amount of so many years rent is set; but whenever annual rests are directed, they must be calculated from the time the mortgagee entered into possession, and not from any subsequent period. Thus in *Davis v. May*, Coop. Rep. 238, it was insisted on the part of the plaintiffs, that the excess of rent beyond the interest ought to be applied annually in sinking the principal, and for that purpose, the decree ought to direct that the accounts from 1809 to 1815, be taken with annual rests. Sir S. Romilly, for the defendants, contended that the accounts ought not to be taken in that manner, but that the proper mode was to calculate interest on the original debt from the date of the mortgage, and ascertain the amount of all rents received, and then deduct the total rents from the amount of the principal mortgage money and the interest so to be calculated on it; that an application having been made to the Register, he had searched his books for three or four years past, and had found ten cases of decrees for taking the accounts of mortgagees in possession, only two of which, (*Forside v. Boyers*, and *Kingston v. Roper*, which had been cited on the other side,) had directed annual rests to be made, whereas the decrees in the other eight cases did not contain any such direction, from which it seemed clear that it was not the usual course of the court to direct annual rests unless the case was extraordinary, and where the mortgagor would be materially injured without it; and the Register, upon being consulted, had also stated, that it was not usual to direct annual rests, except under special circumstances. Sir W. Grant, M. R., said, he thought his recollection of the form of decrees was the same. The direction to take accounts with rests was not of course. There was no instance of a decree in the form prayed, with rests from a particular period of the account, when the arrear of interest was discharged. There were only two forms of decrees, either with or without rests. Here the special circumstances were against such a direction, which it was admitted, would be improper from the beginning of the account while there was an arrear of interest. The account was accordingly directed without rests. *Stokoe v. Robson*, 19 Ves. 385. In *Raphael v. Boehm*, 11 Ves. 92, the decree directed a computation of interest at 5 per cent. on all sums received by the executor while in his hands, and that "the Master do, in such computation, make half-yearly rests." This decree, though perhaps going farther than usual, was held under the circumstances properly executed by a computation of interest upon each receipt from the day it was received: the balance of receipts, with the interest so calculated, and payments being struck at the end of the half year, and that balance, so composed of principal and

Rests sometimes dispensed with, when interest has been in arrear.

had not been for their own default(a); and yet if the person, decreed to account, receive any thing subsequent to the decree, [1039] it is enquirable before the Master, and the defendants in such case must bring such sums so received to account (v).

(a) *Bulstrode v. Bradley*, 3 Atk. 582. [See also *antea*, 949, of this edition, note (G).—Ed.]

interest, being carried forward as an item in the accounts, producing interest.—As to the circumstances which call for a direction of annual rests, the general principle is, that a specific case must be made out shewing that the mortgagor would be materially injured by not being allowed interest on the annual balances in the hands of the mortgagee. In *Sheppard v. Elliot*, 4 Madd. Rep. 254, the interest had never been in arrear, and the rents exceed the amount of the interest payable on the mortgage. Sir J. Leach, V. C., said, the account in this case was to be directed with rests, in order that the excess of rent beyond the interest might be applied in sinking the principal. But his Honour added, that the court sometimes relaxed this rule, where the interest was in arrear when the mortgagee took possession.

A mortgagee in possession, holding over after payment of his principal and interest, will be charged with interest on the balance in his hands. *Quarrell v. Beckford*, 1 Madd. Rep. 269. So in *Trimleston v. Hamill*, ubi supra, a mortgagee in possession was charged with interest on sales of rent received by him after the debt was satisfied. 1 Ball & Bea. 377. *Mortgagee charged with interest on surplus rents.*

(U) In decrees of account it is also sometimes directed, where there has been usury, extortion, or oppression, that every thing doubtful shall be taken most strongly against the person guilty of such iniquitous proceedings; see *Mitford v. Featherstonehaugh*, 2 Ves. 445.

The anomalous cases referrible to the subject of this chapter are the following:—

1st. In directing a second account on the same mortgage, the court will order it to be taken from the foot of the preceding account, (*Procter v. Cowper*, 2 Vern. 377.) or from the date of the confirmation of the report, as the case may happen. *Badham v. Odell*, 4 Bro. P. C. 454, 8vo. edit.

Second account.

2d. If a mortgagee purchase the equity of redemption for a trifling consideration, which purchase is afterwards set aside as fraudulent, he will have to account as mortgagee. *Murley v. Elways*, 1 Ch. Ca. 107. *S. C. ante*, 310, 311, of this edition.

Purchaser to account as mortgagee, when.

3d. A specific legatee of a mortgagee, or rather of the money due on a mortgage, will not be bound by an account settled between the representatives of the mortgagor and those of the mortgagee, for the bequest being notice, the legatee should have been a party to the account. If the mortgage had been devised in general terms to pay debts and legacies, such account with the executor would have been a discharge; but it is otherwise in the case of a specific legacy. *Langley v. Oxford*, Amb. 17.

Specific legatee of mortgage debt should be party to account.

4th. A mortgagee who has been appointed an executor to the mortgagor renouncing the executorship, and then settling his accounts with the other executors, will be subject at any time to have those accounts opened by the parties entitled to the equity of redemption. Lord Eldon's concluding remarks, in *Chambers v. Goldwin*, (9 Ves. 274), supports this position. His Lordship there said, that as to the accounts settled since the decease of the mortgagor between his executors and the assignee of the mortgage, (such assignee being also an executor of the mortgagor, and having renounced,) a court of equity could not on principle, considering what was required from persons standing in the situation of the assignees, hold those accounts, so settled with the executors, not to be open to full investigation in the Master's office; Lord Eldon should therefore vary the decree, as to the former particulars; and confirm it as to the executor's accounts. But as to the accounts settled with the mortgagor, they must be considered as settled, not to be opened, but to be surcharged and falsified.

Account settled between assignee of mortgage and executor of mortgagor liable to be re-opened, and not merely surcharged and falsified.

5th. In a case where the title deeds had been stolen from a mortgagee, the account directed was with an enquiry what had become of them. *Sloke v. Robson*, 3 Ves. & B. 51. *S. C.* 19 Ves. 385; et infra, 1068, s. 11.

Deeds stolen.

Recital.

6th. A mortgagee may take advantage of a recital in the deed of assignment to shew what the mortgagee and assignee considered due, which will be binding on the parties to the deed, according to Lord Redesdale's doctrine in *Carew v. Johnstone*, 2 Sch. & Lef. 295. So a statement of property written by a testator, (who is either a mortgagor or mortgagee) as also his books of account, will be evidence to shew what is really due. *Druce v. Dennison*, 6 Ves. 885.

*Account taken
in equity can-
not be over-
hauled at law.*

7th. After an account taken under a decree in a court of equity, a party will not be allowed to overhaul the account, by bringing an action at law on the same subject-matter. Thus, where a bill had been brought in the Irish Court of Chancery, by Martin and Bell against O'Reilly, and a decree to account had been made, under which the Master took the account, but the defendant, conceiving the same to be erroneous, abandoned it; and brought his action in the Exchequer on the same subject-matter; Lord Redesdale, C., said there would be an end to the jurisdiction of the Court of Chancery in matters of account, if this practice were to be allowed, every account settled by the officer would become the subject of an action. If Bell had promised to pay the sum reported due, and the action had been brought on special assumpsit, Lord Redesdale would not have objected, but this was in effect an action to try whether the account was rightly taken. Both parties had been wrong. Instead of filing this bill, Bell ought to have declined appearing to the action, and to have applied for an attachment against O'Reilly for proceeding at law. Having suffered the action to proceed, Bell should pay the costs of it. But his Lordship would grant an injunction against proceeding at law, and restrain the plaintiff from advancing further in equity; nevertheless, both parties were at liberty to proceed in the first cause as they might be advised, and the account if erroneous, Lord Redesdale added, should be rectified. *Bell v. O'Reilly*, 2 Sch. & Lef. 430.

Bankruptcy.

Lastly, it is observable, that in cases of bankruptcy, where it is merely a question of convenience, it will be left to the assignees to choose whether mortgage accounts shall be taken before the Commissioners or a Master. *Ainsley, Ex parte*, 1 Buck. B. Ca. 292.

CAP. XXI.

[1040]

OF FORECLOSURE (A).

THE same principle of substantial justice, which induced courts of equity to interfere on behalf of a mortgagor, who had forfeited his estate (by not performing the condition annexed to

Mortgagee may foreclose, if estate be in possession, or pray sale, if it be in reversion.

(A) We are now arrived at the last stage of our long journey through the widely extended field of mortgage transactions—the mode whereby the mortgagee may acquire the estate to himself absolutely, and by which he may make all relations between him and the mortgagor to cease. To foreclose the equity of redemption a bill in Chancery is exhibited; to which an answer is put in, and a decree being obtained, a Master is directed to certify what is due for principal, interest, and costs, which is to be paid at a time prefixed by the decree or at a time to be settled by the Master, whereupon the premises are to be re-conveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to stand for ever foreclosed from all equity of redemption, and to convey the premises absolutely to the mortgagee if that has not already been effectually done. Something similar to our modern doctrine of foreclosure appears to have prevailed in the Roman Law, where it is said, “*si eo tempore quo prædium distrahebatur, programmate admoniti creditores, cum præsentibus essent, jus eorum executi non sunt, possunt videri obligationem pignoris amisisse.*” *Cod. de remis. pign. lib. vi.* And by Halifax's Anal. of the Civil Law, it appears, that in case the mortgage money was not paid at the stipulated time, the creditor was empowered to sell the pledge, allowing the debtor two years after notice given to redeem it. *Inst. xi. tit. 8. s. 1.*

Introductory observations.

The recent practice of introducing trusts for sale in mortgages of small amount, or in cases where the circumstances present an hazardous aspect, have tended very sensibly to lessen the use of foreclosures; and the tedious and often expensive difficulties attendant on that process, will operate still more to abridge, if not in the end entirely to subvert, the method of concluding the equity of redemption by foreclosure. While on the other hand, the easy and expeditious mode of obtaining payment of the money lent, comparatively without expense or difficulty, by means of an immediate and peremptory sale, as also the very equitable plan of returning the surplus produced by the sale, after deducting the principal, interest, and costs to the mortgagor, will facilitate the adoption of mortgages with powers of sale, and ultimately, perhaps, establish them as the only and proper mode of mortgaging in general use. A foreclosure may also be obtained on this species of mortgage, but it has been decided, that if a mortgagee with a power of sale files a bill to foreclose, he will not on *motion* be directed to sell. *Anon. MS. 1 Madd. Ch. 532.* For further on mortgages of this latter description, see *antea*, p. 12, of this edition, note (K).

Foreclosure, tedious process, compared with advantages under trust for sale.

The present chapter cannot well be reduced to any regular distribution. The interpolations of the learned author in the fourth edition, may be assigned as the probable cause of this disarrangement. The chapter treats, 1st. Of the general principles of foreclosure; 2d. Of foreclosing a mortgage of stock, p. 1041; 3d. Of the necessary parties to a bill of foreclosure in p. 1042, 3, 8, 9, 1054 and 1056; 4th. Of the time and effect of a foreclosure, p. 1044; 5th. Of the mortgagee's power to sue on all his remedies at the same time, p. 1045; 6th. Of foreclosure against volunteers, and on a mortgage of copyholds, p. 1046; 7th. Of the dismissal of a bill for redemption, p. 1047; 8th. Of imperfect foreclosures, p. 1049; 9th. Of foreclosing particular tenants, (p. 1054), and those in remainder, p. 1050; 10th. Of the effect of foreclosure on incumbrancers who are not parties to the bill, p. 1054, 1066, and 1067; 11th. Of foreclosing infants, (p. 1057),

Contents of chapter.

[1041]

*Stock mort-
gaged, may be
sold without
foreclosure (B).*

the conveyance thereof), and to relieve him from the consequences that in law followed such neglect, rendered necessary the establishment of rules, by complying with which the mortgagee might compel the mortgagor to perform the contract on his part; namely, the repayment of the money borrowed, with interest. This may be done, either by procuring a decree for sale of the estate, if reversionary, or, if in possession, by calling upon the mortgagor in court to redeem his estate presently, or, in default of so doing, to be for ever foreclosed, that is, barred and utterly excluded his equity of redemption without recal, unless upon *special* circumstances (a).

Where the mortgage is of money in the stocks, or the like, no decree of foreclosure is necessary (b); therefore, where a bill was brought in 1729 by the plaintiff, to redeem the sum of

(a) 2 Inst. 198. [As to reversions, see *infra*, 1093.—*Ed.*]

(b) *Lockwood v. Ewer*, 2 Atk. 303.

and feme coverts, p. 1062; 12th. Of the payment of costs of foreclosure, p. 1068 and 1103; 13th. Of the effect of fraud in obtaining a decree of foreclosure, p. 1069 and 1080; 14th. Of enlarging the time to redeem on a decree nisi, p. 1071; 15th. Of opening a decree of foreclosure, p. 1072, 3, and 7, to 1092; 16th. Of foreclosing a Welsh mortgage, p. 1072; 17th. Of suing on collateral securities after foreclosure, p. 1075 and 1077; 18th. Of foreclosing a mortgage as to part of the estate, p. 1092; 19th. Of praying a sale instead of a foreclosure, p. 1093 to 1096; 20th. Of distinctions between foreclosure and redemption, in reference to the doctrine of tacking, p. 1096 to 1100; and 21st. Of restraining bonds within the penalty, p. 1100 to 1103.

Exchequer annuities mortgaged as well as other species of stock may be sold on notice, without foreclosure.

(B) The mortgagee may, at any time after the condition broken, sell the stock and repay himself the money, without being accountable for any depreciation of the funds; nevertheless returning, as it is presumed, the surplus, if any, after payment of his debt and costs to the mortgagor. In the case of *Tucker v. Wilson*, 1 P. Wms. 261, a person possessed of an exchequer annuity for ninety-nine years, borrowed money upon it, and, for securing this money, there was an absolute transfer of the annuity, but with a defeasance, that if the money were paid at such a day, the assignment should be void. The money was not paid at the day; upon which the lender, after several applications for repayment, gave notice that he would sell, appointing a time for that purpose, and desiring the borrower to be present to see that the annuity was sold at the full value. The borrower, by letter, requested the lender to stay a week longer before he sold, which was complied with; and in the interval the lender died suddenly, whereupon the defendant, his administrator, sold the annuity at the exchange, by a sworn broker, for the full value those annuities then sold for, and which was less than the amount of the money due to the defendant. These annuities afterwards rose in value; upon which the mortgagor brought a bill to redeem, and it was so decreed by Lord Harcourt, who ordered the defendant to procure an annuity of the like value and upon the same fund, to be conveyed to the plaintiff upon his paying to the defendant the principal and interest of the money advanced. And his Lordship appears to have made a similar decree in *Manning v. Scott*, cited in the margin of 15 Vin. Abr. 476, pl. 7. But in the case of *Tucker v. Wilson* an appeal was lodged in the House of Lords, where it was insisted on the part of the mortgagee, that these exchequer annuities, as well as stocks, were usually sold at the exchange, and that this was but a pawn; and though there was no express power to sell in the defeasance, yet by the mortgagor's letter it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week; that the convenience of these securities, among merchants, was,

2500*l.* East India stock, transferred to the defendant in 1708, for securing the sum of 2000*l.* and interest; the defendant having executed a defeasance, whereby he obliged himself to transfer the stock on payment of the 2000*l.* and interest, on the 2d of July following the mortgage of it. The Lord Chancellor said, this was a very plain case for the defendant. In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of stock it was not necessary, and therefore a strong reason for the mortgagor's departing from the right.

And the stock having increased in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption (c).

Though it increased in value.

But, it is to be observed on the last-mentioned case, that the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shewn hereafter, a court of equity refuses its aid to a mortgagor, unless under special circumstances.

[1042]

The mortgagor or his heir are necessary parties to a bill to foreclose by the mortgagee (d).

Mortgagor or his heir necessary party to bill of foreclosure. So are three mortgagees having lent equal sums, on one security.

If there be several mortgagees of an entire thing mortgaged, they must all be made parties to the bill of foreclosure. This was held to be necessary in the case of *Lowe v. Morgan* (e), where a share of Covent-Garden Theatre having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Register finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said it was a new case in respect to their being joint-tenants, and that it would be impossible for one to foreclose, without making the other two parties. The cause therefore stood over for that purpose.

[1043]

(c) *Lockwood v. Ewer*, 2 Atk. 303.

at large, *infra*, 1047, 1048, 1052 and 1053.—*Ed.*]

(d) *Homes v. Wadham*, Ridgw. Rep. 199. [This subject is discussed more

(e) 1 Bro. C. C. 368.

that after the day of payment past, they were taken to be ready money; and that it would be infinitely troublesome and dilatory, if there could be no sale of such annuities thus pledged, without a decree of foreclosure; that this would set aside several sales that had been made in like cases, and occasion multiplicity of suits; that the case here was stronger than usual, it being that of an administrator, who was obliged to dispose of the assets of the intestate to pay his debts and legacies. Wherefore Lord Harcourt's decree in the lastly-mentioned case was reversed by the Lords, *semine contradicente*. 1 P. Wms. 262, et vide *infra*, end of next chapter.

[1045] tempt prosecuted for not delivering it accordingly; upon which the heir of the mortgagor set forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being insisted, that the course of the court, upon such a bill, was, and the court could go no farther than, to take away the equity of redemption, and leave the mortgagee to such title as he had, at law, but could not amend it; which the Lord Chancellor agreed to, and discharged the contempt (F).

Mortgagee may foreclose and eject mortgagor at same time.

A mortgagee may bring an ejectment, at law, at the same time that he hath a bill of foreclosure depending (k); for he will not be prevented from pursuing *all* his remedies for the recovery of his debt (c).

But ejectment stayed, if mortgage appears satisfied, till that determined (n).

But special circumstances may arise, which will take the case out of the common rule, and induce the court to grant an injunction, to stay proceedings upon the ejectment. Thus,

(k) *Booth v. Booth*, 2 Atk. 344.

(F) But if the estate and interest which the mortgagee is intended to take, or the title to that estate be defective, and the means of curing it are in the power of the mortgagor, he will be decreed to make the best title he can. See *infra*, page 1066. This, indeed, the mortgagee may enforce on his covenant for further assurance.

Mortgagee may sue on all his remedies at once, and court will not prevent him.

(G) He may bring an action on the covenant to repay the money, serve an ejectment on the tenant in possession, file a bill to foreclose the equity of redemption, and arrest the mortgagor at the same time; but he cannot have his money and the estate too. See *antea*, 204, of this edition, in the text, and n. (l) there. In *Sunderlin v. Malone*, Irish T. R. 483, it was the unanimous opinion of the Irish Court of Common Pleas, that where a bond was given as a collateral security to a mortgage, the mortgagee might have sued both upon the bond and the mortgage at the same time. So it was held in *Garforth v. Bradley*, 2 Ves. 678, that a mortgagee might bring an ejectment and bill of foreclosure at the same time, which the court would not prevent; and it may be inferred from the case of *Colley v. Gibson*, 3 Smith. 516, that if the mortgagee should pursue *all* the before mentioned remedies at the same time, which in appearance he could only do for the purpose of harassing the mortgagor, yet that a court of equity will not interfere to restrain him. In that case a mortgagee filed a bill of foreclosure, and proceeded to execution in ejectment, whereby he acquired possession, and received the rents and profits to the amount of 200*l.* a year; he then brought an action of covenant against the mortgagor for the money, and obtained execution in that suit. The Court of King's Bench in England refused to discharge the defendant out of execution, assigning as a reason that the plaintiff had a right to pursue his remedies on all his securities. 3 Smith. 516.

Text corrected.

(H) The case referred to supports this marginal deduction, and such was the principal point in it, but that does not appear in the text. Lord Hardwicke said, though the defendant was foreclosing the equity of redemption, yet he was not precluded from bringing an ejectment at law at the same time, unless there was something very particular to take it out of the common case. The only material question was, whether there were any grounds to presume that the mortgage was satisfied? As to the personal estate, it was most clear that the plaintiff's brother was an incumbered man, and that he made an assignment of it to a neighbour before his death. Then how could it be inferred from this, that the mortgage was satisfied: especially when two witnesses swore for the defendant, that upon

where a bill was brought by the plaintiff against the defendant (l), for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him; the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem. [1046]

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree (m). Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him, to protect his incumbrance; the Court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so; saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

Mortgagee (having notice of voluntary settlement) procuring legal estate from trustees, refused decree of foreclosure against volunteer (l).

A mortgagee of a copyhold estate, who is not in possession, may exhibit his bill against a mortgagor, before admittance, for a decree of foreclosure (n); and, after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises. [1047]

Mortgagee of copyhold may foreclose before admittance.

Where a mortgagee is made a party to a bill, praying relief [by the mortgagor (o), it] is the same thing as praying to re-

Dismissal of mortgagor's bill for relief equal to decree of foreclosure.

(l) *Booth v. Booth*, 2 Atk. 344.

[S. C. *supra*, 80, *infra*, 1054 and 1080, as to fraud.—Ed.]

(m) *Saunders v. Deben*, 2 Vern. 271. S. C. *supra*, 545.

(o) *Cholmley v. Countess Dowager of Oxford*, 2 Atk. 267.

(n) *Sutton v. Stone*, 2 Atk. 101,

his quitting and delivering up possession of the mortgaged estate, he did it upon these express terms, provided the interest due on the mortgage should be paid. However it was not quite so clear his Lordship added as the common case, being entangled with an account of the personal estate, and therefore if the plaintiff would agree to give security to redeem, an injunction to stay proceedings upon the ejectment should be directed, which might ultimately be of advantage to all parties, as it would keep the possession in suspense till the account was determined. *Booth v. Booth*, 2 Atk. 343.

(I) A person taking the legal estate from a trustee with notice of the trust, becomes himself a trustee, (*antea*, 535, of this edition, text). If in the above case the mortgagee had not taken a conveyance from the trustees, he being a purchaser for valuable consideration, the voluntary settlement would have been void against him, notwithstanding the notice, see *antea*, p. 656, of this edition, n. (D); but being a purchaser *pro tanto* only, an equity of redemption remained with the volunteers, and having notice of the settlement; the mortgagee was bound to make them parties to the bill of foreclosure, according to the rule or supposed rule submitted in p. 1067, *infra*, in the note.

Volunteer necessary party to foreclosure, when.

deem, for redemption is the proper relief; and if, upon a reference to a Master to see what is due for principal, interest, and costs, the plaintiff does not redeem the mortgagee, the court will, on his application, dismiss the bill, as against him, which is equivalent to decreeing a foreclosure (κ).

Demurres that mortgagee's executor is no party, allowed.

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or, to be decreed to make farther assurance, and be foreclosed of redemption (p); it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party.

And proceedings stayed if that fact appear at hearing.
[1048]

And, since it has been determined (g), that, in all mortgages, the money belongs to the executor or administrator, and not to the heir; if it comes out, upon the hearing, that the executor or administrator [of the mortgagee] are not parties, the plaintiff in the cause [the heir of the mortgagee] cannot be permitted to proceed.

Mortgagor's executor need not be party; contra of his heir (L).

The executor of the mortgagor need not be party (r); for where, on a bill brought by a mortgagee against the mortgagor to foreclose, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of the Rolls and the Register,

(p) *Freak v. Hearsey*, 1 Ch. Ca.

51. [S. C. 2 Freem. 180. Nels. C. C.

93.—Ed.],

(g) *Meeker v. Tanton*, 2 Ch. Ca. 29.

(r) *Duncomb v. Hansley*, 3 P. Wms.

333, n. [et vide S. L. antea, 1042.

—Ed.]

Motion of course to dismiss bill to redeem.

(K) In which case the motion to dismiss the bill with costs is of course, on an affidavit of attendance at the time and place appointed by the report, and of non-payment of the money found due. *Stuart v. Worrall*, 1 Bro. C. C. 581. So in *Bishop of Winchester v. Paine*, 11 Ves. 194, it was acknowledged that default of payment under a decree upon a bill for redemption would operate as a foreclosure.

Dismissal of bill to redeem for want of prosecution, no foreclosure.

But it is essential to subjoin this material distinction between the dismissal of a bill to redeem, for want of prosecution or any other cause *in limine*, and the dismissal of such a bill for non-payment of the money at the day appointed by the report. It was impossible said the court, in a late case, to contend that the dismissal of a bill to redeem for want of prosecution should have the same effect as a decree for non-payment of the money; for a dismissal for want of prosecution did not prevent the filing of another bill for the same matter. *Hansard v. Hardy*, 18 Ves. 460. S. C. 4 ib. 466. 5 ib. 426.

Heir and devisee of mortgagor.

(L) But the mortgagor's heir will not be a requisite party when the equity of redemption has passed to a devisee, antea, 269 and 402, of this edition, et vide *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135, where it was made a serious question, whether a devisee and heir at law should both join in a bill claiming an equity of redemption, upon the allegation that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them. Sir T. Plumer, M. R. thought the bill should have been by the devisee alone, praying a separate redemption, and that the heir should not have been a co-plaintiff, but a defendant, if a party at all; nevertheless his Honour seemed very dubious on the point. As to the mortgagee's devisee, see *infra*, p. 1036.

that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir; and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it (M).

(M) This doctrine has been confirmed by the case of *Bradshaw v. Outram*, 13 Ves. 234. There a tenant in fee-simple made a mortgage by creating a term of 1000 years, with a proviso in the usual manner to be void upon payment by the mortgagor, his heirs, executors, or administrators. A bill to foreclose was filed against the infant heir at law of the mortgagor, and also against his executrix. It was objected that the executrix was not a necessary party; for that no decree could be had against her, and therefore that so much of the bill as sought a foreclosure against the executrix, should be dismissed with costs. It was contended for the mortgagee, that he had a right, if he pleased, to bring the executrix before the court; and the mortgage in the present instance being for a term of years, it was absolutely necessary to make the executrix a party; for the mortgagee could not have a foreclosure unless in the first instance he brought forward the personal representative of the mortgagor who might redeem; and who, if not made a party, might after the foreclosure tender the money; and as the personal representative was bound to pay the mortgage, if she had assets, this was submitted to be the proper time to call upon her for such payment. Sir W. Grant, M. R. observed, that with the present species of term the personal representative had nothing to do; it was created only by being mortgaged. The executor was named in every mortgage deed; and in every case the personal representative was to pay, if there were assets, though the heir was to have the benefit. But as this was a mere matter of practice, further enquiry should be made upon it. The bill was ultimately dismissed against the executrix by consent, but without costs. 13 Ves. 236. The short note of *Meeker v. Tanton*, 2 Ch. Ca. 29, is contra; but the word "mortgagor" there inserted in the second line was most probably intended for "mortgagee;" without this correction the case is inconsistent and unintelligible,—in its present reading, it speaks of the executor or administrator of the mortgagor being entitled to receive the money.

Mortgagor's executor unnecessary party to foreclosure, even where mortgage is for years.

But though the law may be thus stated, yet in a late case it was considered necessary by the present Master of the Rolls to make the executor of a mortgagor a party, where on the face of the bill it appeared that he had been in receipt of the rents and profits of the mortgaged premises, and had paid the interest and part of the principal. The executor in this case was an essential party to the account to be taken of what was due on the mortgage. The bill anticipated this objection, and stated as an answer to it, that the personal representative could not be found. That was negatived by the answer. The executor was shewn to be living, and his residence pointed out. "The bill was therefore defective in this particular." Per Sir Thomas Plumer, M. R. in *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135. To a bill which prays a sale instead of a foreclosure, the personal as well as the real representative of the mortgagor must be a party; for it is requisite to shew that the personal estate has been applied before the court will decree the real estate to be sold. *Daniel v. Skipwith*, 2 Bro. C. C. 155. *Fell v. Brown*, ib. 276; so if a bill be filed by a mortgagee for the execution of a trust for sale by way of mortgage, the personal representative of the mortgagor will be a requisite party; for if the person having the legal title, and being competent to sell, will have the assistance of the court, all who are interested in the result of the sale must be parties, that the whole of their claims may be arranged by the decree. *Christophers v. Sparkes*, 2 Jac. & Walk. 229. S. C. infra, Appendix, No. xxvi. at the end. And if there be one mortgage of freehold and leasehold estates together, and the mortgagor dies, both his heir and executor will be necessary parties to a bill of foreclosure. *Robins v. Hodgson*, Har. Ch. Prac. 30.

Except he has received part of rents, or where bill is for sale, or where mortgage is of freehold and leasehold property together.

Decree obtained by mortgaged's heir, binding on his executor, though latter no party.

[1049]

But a foreclosure, obtained on a bill exhibited by the heir at law [of the mortgagee] will be binding (s), although the executor or administrator [of the mortgagee] be not a party; for if the executor or administrator should afterwards come against the heir to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself (ss).

But heir in this case, though trustee for executor, may take land on paying money.

When the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party (t); upon a bill, by the executor, against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor.

But it is observable that, in the last case, the heir made no offer to pay the mortgage money to the executor, which is the basis of the resolution in the former case (N).

(s) *Clarkson v. Bowyer*, 2 Vern. 666, of this edition, n.(E).—Ed.]

66.

(t) *Globe et Ux. v. Earl of Carlisle*,

(ss) [See the same law, antea, cited in *Clarkson v. Bowyer*.

Mortgagee's heir necessary party to bill of foreclosure by his executor.

Trustee having legal estate, necessary party to foreclosure.

(N) It may be proper to add in respect of the mortgagee, that his executor cannot file a bill to redeem or be foreclosed, without making the heir of the mortgagee a party; for if the mortgagor should redeem, there will be no one before the court from whom a conveyance of the legal estate can be taken. No direct authority can be found for this position; but it was evidently acted on in *Wood v. Williams*, the case next cited.

Where, on a bill to foreclose, the mortgage was stated to have been made by demise to one Holt, but that he was only a trustee for the plaintiff, who advanced the money, and that Holt had executed a declaration in writing, whereby he declared, that his name was made use of in the mortgage deed as a trustee for the plaintiff; the Vice-Chancellor said it was necessary that Holt, the trustee, should be a party to the suit; for it was his legal estate which was to be protected by the decree of foreclosure, and he was a necessary party to an immediate re-conveyance, if the defendant should redeem. His Honour therefore ordered the cause to stand over, with liberty to amend, by adding parties, the plaintiff paying the costs of the day. *Wood v. Williams*, 4 Madd. 186; et vide *S. L. Ceres v. Johnston*, 2 Sch. & Lef. 295; and further as to trustees, antea, 402, of this edition, n. (K).

Bankrupt unnecessary party to foreclosure.

If the mortgagor become bankrupt, he will not be a necessary party to a bill of foreclosure by the mortgagee; it will be sufficient if the assignees are before the court. *Adams v. Holbrooke*, Harr. Ch. Pr. 30. But in *Bainbridge v. Pinkhorn*, 1 Buck. B. C. 135, where the bill was for a foreclosure against the assignees only, without the bankrupt being made a party to the suit, it was insisted, that as no bargain and sale of the bankrupt's real estate had been made to the assignees by the commissioners, they had no interest, and that the bill could not, consequently, be supported for want of equity in the defendants. On the other side it was contended, that notwithstanding the bargain and sale had not been executed, yet, as the assignees had a right to call upon the commissioners at any time to execute it, they had such an interest as might be the subject of foreclosure. The Master of the Rolls said, that if the assignees had not any interest in the estate, the mortgagee could not perfect his title by foreclosing them; but the usual decree of foreclosure was ultimately pronounced, which of course decided against the necessity of making the bankrupt a party. In a late case, Sir John Leach, V. C. went fully into the subject, and has made ample amends for the loss of his Honour's judgment in *Bainbridge v. Pinkhorn*.

Though no bargain and sale

The case alluded to was exactly similar to that of *Bainbridge v. Pinkhorn*, ubi supra, (except that the bankrupt was made a party to the suit),—the

A plea of a decree for foreclosure in the common form, *Plea of foreclosure without final order,* with an averment of non-payment of the money, &c. *but no final order,* on appeal from Lord King, was *bad (it).*

(*it*) [For the estate does not lose the quality of a pledge until the final order of foreclosure has been pronounced. *Thompson v. Grant*, 4 Madd. 488.—*Ed.*]

simple question being, whether, on a bill to foreclose a mortgage of a copy-hold estate, made by a person who afterwards becomes bankrupt, and whose estates have not been assigned to his assignee, the bankrupt is a necessary party? The Vice-Chancellor said it laid upon the plaintiff (the mortgagee) to shew that in some way in which the suit might terminate, it was necessary for his protection that the bankrupt should be a party. The suit must terminate either in redemption or foreclosure. If the assignee, being the sole defendant, redeemed the plaintiff, and he re-conveyed the estate to him, it was not alleged that the absence of the bankrupt from the suit could be a prejudice to the plaintiff. The only question was, whether in case the plaintiff obtained a decree of foreclosure against the assignee alone, it could prejudice the plaintiff, that the bankrupt was not made a party to the suit? It was true that an equity of redemption was an interest in real estate; and it might be well to consider the general question, whether the bankrupt before the bargain and sale was a necessary party to every suit in which the plaintiff asserted a claim upon the bankrupt's real estate against the assignees? The real estate of the bankrupt was not formerly taken out of him until a bargain and sale was executed; but the effect of the bankrupt laws was immediately to vest the real estate of the bankrupt potentially, though not formally, in the assignees. They could call for the formal transfer at their pleasure, and the real estate of the bankrupt was as much bound by the contracts of the assignees before the bargain and sale, as it was afterwards. Before the bargain and sale, therefore, all beneficial interest was out of the bankrupt, and he differed from every other person who in form retained a legal estate; he had no power of affecting that estate; and it passed from him, not by his own act, but by the act of others, and without his will. Having thus neither interest nor power in the subject of the suit, which required to be bound by the decree of the court, it was difficult to conceive any principle upon which he could be considered as a necessary party. If it were said there was a possibility that the bankrupt might thereafter acquire the property of his real estate, unconverted, by payment of twenty shillings in the pound to his creditors, the answer was, that such a mere possibility was not an interest; and that in the mean time his estate was fully represented by his assignees, and he was bound by their acts alone out of court, and must be equally bound by their presence alone in court. That a bankrupt should be joined as a party-defendant to every bill filed before a bargain and sale respecting his real estate, would be equally vexatious and oppressive to the plaintiff and to the bankrupt; to the plaintiff, because the expences of the suit would be increased by the presence of a party who could not pay him costs, and to the bankrupt, because he would have no means of defence, and no interest to defend. If, however, it could be generally necessary, that in a question respecting his real estate, the bankrupt should be a party before the bargain and sale, it would not follow that he must be a party to a bill of foreclosure. After a mortgage in fee, no estate was in form left in the bankrupt. The equity of redemption was not an estate, but an interest. [See as to this, *antea*, p. 252, of this edition, *in notis*] and might well be considered as substantially vested in the assignees before a bargain and sale. Whatever therefore might be the case with respect to real estate, generally, it would be difficult to establish that it was necessary to give the assignees a title to redeem against the mortgagee, that there should be a bargain and sale of the equity of redemption; and still more difficult to establish, that if the estate were not worth redemption, there should be a bargain and sale in order to give force to a decree of foreclosure against the assignees, or to a release from them of the equity of redemption. Upon the whole therefore the learned Judge was of opinion, that although there was no bargain and sale, a decree of foreclosure against the assignee *has been made from commissioners to assignees.*

Contracts of assignees before bargain and sale, binding.

Bargain and sale not necessary to give assignees right to redeem.

[1050]

*Calendar not
lunar months.*

*Decree of fore-
closure on ten-
ant in tail,
binds issue and
remainder-man
(o).*

*So decree on ten-
ant for life
binds remain-
der-man (P).*

held not to be good (u); for, although such plea and length of time might be a good defence, yet, as a plea, it could not stand for want of a final order.

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones (x).

A decree to foreclose tenant in tail of an equity of redemption, will bind his issue, and also those in remainder, who are no parties to the mortgage; because the equity of redemption is a right set up *only* in a court of equity, and may be there extinguished.

Thus where, in May, 1613, R. on his marriage with D. his wife, settled lands on himself for life, remainder to D. for life, remainder to the heirs male of his own body, and then died,

(u) *Senhouse v. Earl*, 2 Ves. 450.

(x) *Anon. Barn. 324. S. C. 2 Eq. Ca. Abr. 605, pl. 38.*

*Release of equi-
ty of redemption
by assignees
alone binding
on bankrupt.*

*Bankrupt hav-
ing deeds, not
necessary party.
Semb.*

*Surety must be
party to bill
of foreclosure
against princi-
pal.*

Lessee.

*Tenant in tail
represents re-
mainder-man.*

*Foreclosure
against tenant
for life only,*

nees alone could never be impeached by the bankrupt; and further, that although there were no bargain and sale, the bankrupt could never impeach a release of the equity of redemption, if the assignees, in order to save the expence of a suit for foreclosure, should think fit to execute such a release. *Lloyd v. Lander*, 5 Madd. 288.

In the above case it was said, that the bill charged that the deeds and muniments were in possession of the bankrupt, and prayed a delivery of them, and that for this purpose he was a necessary party. But the Vice-Chancellor over-ruled that objection, observing, that though the bill charged generally that the confederates had in their power deeds and papers, yet this could not be understood as making a charge against the bankrupt specially, and was rather to be referred to a possession of the confederates, according to their rights and interests. 5 Madd. 291.

In reference to the parties, it is further observable, that a bill of foreclosure against one of two mortgagors, to whom an entire sum has been lent, will not lie without bringing both of them before the court, although the mortgage be of two different estates. *Stokes v. Clendon*, Rolls, 3d December, 1790. In this case there was a mortgage by the principal of one estate, and a mortgage by the surety of another, as a collateral security, and the Master of the Rolls determined, that a bill of foreclosure against the principal only could not be sustained without making the other mortgagor a party, because such other mortgagor had a right to redeem and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount than the first estate might be deficient to satisfy. The bill was ordered to stand over for want of parties. From Lord Colchester's MSS. cited 2 Bro. C. C. 275, Belt's edit. n. (1). Et vide infra, p. 1092, as to foreclosing a mortgage of part of the estate; and antea, p. 339, of this edition, n. (Z), for the cases on the necessity of redeeming both estates or neither.

A lessee may redeem, but it does not appear that he is a necessary party to a bill of foreclosure. For the parties to a bill of redemption, see antea, 402, of this edition, to 405, and p. 1033, of the 4th edition.

(O) This is analogous to the rule of law, that a tenant in tail may join the issue in a writ of right. In all adverse real actions the tenant in tail supports the rights and interests which relate to the inheritance, and defends for those in reversion or remainder, as well as for the interest of himself and his issue. 1 Pres. Abst. 407.

(P) This ancient determination has long since been over-ruled; and it is now settled, that the tenant for life and person having the next vested estate of inheritance should be parties to the bill of foreclosure, as also

having issue, C. his first, and H. his second son (y). D., his widow, married with G., and they entered on the lands in question as D.'s jointure. C., the son, in November, 1638, for 800*l.*, conveyed these lands by deed, fine, and recovery, to G. and his heirs, to the use of D. for life, remainder to the use of C. and his heirs, till he failed to pay several sums, amounting to 800*l.* at several days, and after default of payment of any of these sums, to G. and his heirs. Afterwards, in 1639, C. on his own marriage, settled these lands on himself for life, remainder to M. his wife for life, remainder to his first and other sons in tail, remainder to H. in tail. In 1650, G., with the consent of C., assigned his estate, which was for the security of the 800*l.*, and was forfeited, to B. In 1656, B. obtained a decree to foreclose; unless C. paid him what was due; C. died without issue male; D. lived till 1668; then H. exhibited his bill to redeem, alleging that he, being no party to the decree, and C. but tenant for life, it could not bind him. But the Court were of opinion, that H. ought not to be admitted to redeem; and Lord Chief Justice Hale said, he was of opinion, that there was no colour for such a decree; that it had gone far enough, and that he would go no farther than precedents in the matter of equity of redemption, which had too much favour already; there should be no decree for H. in respect of the antiquity, for if he would redeem, he must come in time. It was but just to foreclose for not coming in time; and a decree to foreclose tenant in tail should bind his issue in an equity of redemption. The estate moved from C. to B., and not from H.;

[1051]

[1052]

(y) *Roscarick v. Barton*, 1 Ch. Ca. 217.

any intervening tenants for life whose estates are vested; see *infra*, p. 1053 and 1054, and note to latter page. The only case where a foreclosure will be decreed against a tenant for life and the parties before the court, without the remainder-man is, where the remainder-man is abroad. But then such foreclosure will not be final nor relieve the mortgagee from the necessity of keeping accounts. Thus in *Fishwick v. Lowe*, 1 Cox, 411, a bill to foreclose was preferred against the tenants for life, and some incumbancers under the will of the mortgagor; but the tenant in tail was abroad and out of the jurisdiction; and a doubt arose, whether the court could decree a foreclosure without the tenant in tail being made a party. Sir L. Kenyon, M. R., said he had looked into the cases which he thought most probable to bear any analogy to the present, but they did not apply; that it was not like the case of parceners, for there you might proceed to summons and severance; yet his Honour thought he might make the decree against the parties before the court; at the same time, he could not conceive how it could be worth the plaintiff's while to take such a decree. In the common case a foreclosure was convenient, because it relieved the mortgagee from keeping an account of the rents and profits; but here the tenant in tail might compel an account over again whenever he thought fit. However, if the plaintiff chose it, his Honour would decree a foreclosure against the present defendants; and the usual decree was made.

remainder-man
being abroad.

and C. was the visible possessor and owner. It was a great sore, that mortgagees were but bailiffs; and the limitation to H. was but voluntary, so his pretence was not to be supported against a purchaser, for so a mortgagee was (yy); here the purchase was made absolute by the decree, and if there were divers remainder-men of the equity, there would be no occasion to make them *all* parties.

Release of equity of redemption by tenant in tail after decree to account, equal to absolute foreclosure by order.

And a release of the equity of redemption by tenant in tail, under a subsequent settlement, after a decree for an account and foreclosure, is tantamount to an absolute foreclosure by order.

[1053]

Thus (z), where H., being seized in fee, mortgaged for years, and afterwards in 1734, made his will, and devised his estate to his son and his heirs, subject to an annuity to his wife for life, and to the incumbrances upon the estate; and in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughters should all die without issue, then to his wife for life, remainder to his own right heirs. A bill was brought by P. as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the Master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained 21, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and R., having bought the daughter's interest for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellor was clearly of opinion, that P. was not entitled to redemption.

First tenant in tail party to bill of foreclosure, sufficient.

[1054]

That the first tenant in tail being a party to the foreclosure was sufficient. That he sustained the interest of every body, and those in remainder were considered as cyphers. That it would be very inconvenient if the remainder-men were necessary to be parties. There might never be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon such terms. That the release

(yy) [S. L. antea, 281, of this edition, and 9 Mod. 396.—Ed.]

(z) *Reynoldson v. Perkins*, Amb. Rep. 54.

in this case, was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of *Roscarrick v. Barton* (a).

But it was observed, in the preceding case, that the length of time elapsed after the receipt and foreclosure was an additional circumstance against the relief prayed, and that the plaintiff appeared to have purchased the daughter's interest for a trifle, and was trying an experiment.

But, although in such case, where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure (b), yet if there be an express estate for life [and it remains doubtful whether that person be not

Tenant for life and person having next vested estate of inheritance necessary parties (a).

(a) 1 Ch. Ca. 217, *supra*, 1050.

(b) *Sutton v. Stone*, 2 Atk. 101.

(Q) This, in the instance of a strict settlement, would exclude the trustees to preserve contingent remainders, who have not estates of inheritance but merely vested estates descendible to heirs during the life of the particular tenant; but it is apprehended that such trustees will be necessary parties before the birth of issue, and whilst it remains uncertain in whom the next remainder will vest, and perhaps till the arrival of such issue to the age of twenty-one, when their office virtually determines, there being then no contingent remainder to support, and it may be contended, that they will be necessary parties in every event; for, that supposing the tenant for life to commit a forfeiture of his life interest, the estate of the trustees or their heirs will immediately vest in possession, which would be outstanding if they were not personally foreclosed; besides trustees, to preserve contingent remainders, may redeem for the benefit of those whose estate and interest they are appointed to support, provided the tenant for life neglects or refuses to exercise equity of redemption; which, on principle, should decide the question in the affirmative; viz. that trustees, to preserve contingent remainders, will in every event, be necessary parties to a bill of foreclosure. The Master of the Rolls, in the great case of *Cholmondeley v. Clinton*, *infra*, Appendix, No. xxvi. was of this opinion. He said it was sufficient to bring before the court the trustees, and the person *in esse* entitled to the first vested estate of inheritance; those who had contingent interests were not necessary parties; and Lord Hardwicke considered that the established rule in *Hopkins v. Hopkins*, there cited, *quod vide*.

Trustees to preserve contingent remainders necessary parties to bill of foreclosure.

In one case, trustees to preserve contingent remainders in a marriage settlement, there being no issue, were decreed to join in a sale where a foreclosure was threatened. In the case alluded to, S. made a mortgage of the lands in question for the term of 1000 years, to secure 1000*l.* and interest, and afterwards upon his marriage, settled the lands in mortgage to the use of himself for life, with remainder to the use of trustees during his own life to support contingent remainders, with remainder to his wife for life, with remainder to his first and other sons in tail, with ultimate remainder to his own right heirs, and having no issue, articulated to sell the lands to P., who brought his bill in equity and set out the foregoing matters; stating also that the trustees refused to join, that the mortgagee threatened to enter, and prayed a specific execution of the agreement, and that the trustees might be decreed to join in the conveyance. S. and his wife, by answer recited the settlement, and said that they had been married six [ten] years, [Reg. Lib.] and had no issue, and confessed the contract with P., and that they were willing to perform it. The trustees expressed their willingness to do as the court should direct, being nevertheless indemnified. For P., it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might not only enter, but foreclose, which would bind, though there should be issue afterwards born;

Trustees to preserve contingent remainders decreed to join in sale, there being no issue after ten years, and foreclosure threatened.

also tenant in tail,) the remainder-man [who has the first vested estate of inheritance,] ought to be a party.

and that the husband and wife not being able to redeem, a sale was absolutely necessary, otherwise the benefit of redemption would be lost as well to the husband and wife as also to the issue, in case there should be any. The Master of the Rolls decreed the trustees to join in the sale, and to be indemnified, the settlement being only of an equity of redemption, and the wife being in court and examined whether she freely consented thereunto or not.—“The decree is so,” adds Mr. Raithby, note (3), “but there is no reason stated, except that the premises appear to be of small value. Reg. lib. 1693. B. fol. 54.”

Effect of presumption in equity that possibility of issue is extinct.

As to the possibility of issue being extinct, a court of law will not presume this fact until the death of one of the parties; but there are instances where a court of equity has exercised a discretionary power over trustees for preserving contingent remainders, and directed them to convey and even to join with the tenant for life in barring the subsequent contingent limitations, on the presumption that the parties will not have any children. This, however, has only happened under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement; or in favour of creditors where the settlement was voluntary; or for the advantage of the persons who were the first objects of the settlement, as to enable the first son, &c. to contract an advantageous marriage. Butl. Fearne, 531. Nevertheless, in *Davis v. Weld*, 1 Vern. 181. S. C. 1 Eq. Ca. Abr. 386, pl. 5, where the husband and wife, after being married twelve years without having any issue, filed a bill against the trustee, that they might be enabled to sell part of the land for payment of debts, Lord Keeper Guildford said, he did not know how to make such a decree, for he had known where people had been married near twenty years without issue and after had children; though at the plaintiff's importunity, he gave time to attend him with precedents.—The jurisdiction of the court to exercise its discretion in these cases has never been doubted; but the task of deducing from the conflicting cases the true principle of decision, has been confessed by an eminent judge to be greater than he had abilities well to execute, see the observations of my Lord Eldon, in *Biscoe v. Perkins*, 1 Ves. & Be. 491. But to return,

Intermediate tenants for life should be parties.

The intermediate tenants for life should be parties to a bill of foreclosure, in order to give them an opportunity of redeeming. This was decided in *Gore v. Stackpole*, 1 Dow Par. Rep. 18. S. C. on other points, ante, p. 549, of this edition, *in notis*. The case was this:—The mortgagor devised his equity of redemption to A. for life, with remainder to B. for life, with remainder to his first and other sons in tail male, with remainder to C. for life, with remainder to his first and other sons in tail male, with remainder to D. for life, with remainder to E. for life, with remainder to his first and other sons in tail male, with remainders over. A. died soon after the testator, and B. died in his life-time (without sons, as it is presumed, but that fact does not appear on the report), whereby the remainder to C. fell into possession. C. was a minor, and one F. obtained letters of guardianship of his person and estates. In 1731, the mortgagee filed a bill of foreclosure in the Irish Court of Exchequer against C. the minor, and the executors of the testator; to which bill the minor, by his guardian, put in an answer; and in 1733 a decree was pronounced (according to the usual mode of executing a foreclosure in Ireland) that the equity of redemption should be foreclosed, that the estate should be sold, the mortgagee paid his money, the surplus returned to the defendants, and that all proper parties should join in the conveyance. The final decree was pronounced in 1733, at which time D. and E., the remainder-men for life, were both living, but neither of them were made parties to the foreclosure. In 1746, soon after C. became of age, the decree was revived and the mortgaged estates put up to sale by the Deputy Remembrancer, and were in pursuance of a previous arrangement between C. and his agent, bought in at considerably less than their value; but they were afterwards sold to three different persons, two of whom, if not all three, were cognizant of the will, and of the manner of obtaining the decree of foreclosure; but they had suffered recoveries, apparently for the purpose of strengthening their titles. C. died in 1796 [without sons,] and in the same year a son of E., who was the next remainder-man in tail, filed his bill against the mortgagee and purchasers for redemp-

If there be many incumbrancers, some of whom are not made parties to a bill to foreclose (c), the plaintiff, in the *Party incumbrancers bound.*

(c) *Draper v. Jennings*, 2 Vern. 518. the necessary parties to a bill of [et vide infra, 989, of this edition, foreclosing, in respect of the incumbrancers.—Ed.] note (C). for further observations on

tion, which bill, Lord Clare, C., dismissed with costs as to the purchasers, probably on account of the recoveries and length of time (fifty years); but directed it to stand over as to the mortgagees.

The cause came on for further directions in November, 1803, before Lord Redesdale, who pronounced a decree, declaring, "That as none of the persons in being, and entitled in remainder, were made parties to the proceedings in the cause in the Exchequer, although the parties to such cause had notice of the mortgagor's will, the same being set forth in the pleadings; and as the said minor was tenant for life only of the estates under such will; the proceedings in that cause did not in any manner bind the rights of the parties entitled to estates in remainder, and such proceedings were on the face of them erroneous, and wanting the necessary parties to give them force and effect, and that the same, under the circumstances, ought to be deemed fraudulent, collusive, and void, as against the plaintiff, and all persons entitled in remainder, under the mortgagor's will." The decree then ordered, that the legal estate in all the mortgaged lands should be re-conveyed to the plaintiff, except those sold to two of the purchasers, the decree of dismissal as to them having been enrolled, and so, not capable of being re-heard in the court below. To reverse this decree as to one of the purchasers who had clear notice of the fraud, an appeal was lodged by the remainder-man in tail, in the English House of Lords. It was there contended, that C., the minor, could not pass any thing more than his life interest in the mortgaged premises; and that nothing in the transaction ought to be permitted to injure the appellant, or to deprive him of his just rights.

Lord Redesdale, in the English House of Lords, observed, that the cause was carried on in such a way in the courts below, as to leave the Judges in the belief that C., the minor, was the absolute owner; and that the decree of foreclosure was pronounced, and the surplus of the purchase money ordered to be paid to the said C. under that impression. It was impossible not to see that there was in course of the proceedings the most cautious suppression of facts with which the court ought to have been made acquainted. The sum too which should have been paid out of the estates, so as to affect the interest of the remainder-man, was the original amount of the mortgage money only, the interest ought to have been kept down by the tenant for life, and such should have been the directions of the court. And as to the other purchaser against whom the decree of dismissal was permitted to remain undisturbed, on the ground that he had no actual notice of the fraud, Lord Redesdale thought it very doubtful, whether a purchaser for valuable consideration under a decree of the court fraudulently obtained, though ignorant of the fraud, could protect himself, when the fraud appeared on the face of the proceedings. Another objection, his Lordship said, was, that the proper course would have been to file a bill in the Exchequer, to set aside the decree on the ground of fraud. The answer to that was, that the decree neither did nor could bind the remainder-man at all, but only the tenant for life. The clearest title could not be used by a person cognizant of any fraud affecting it; and by the register statute even a registered deed could not be used against an unregistered deed, if the person in whose favour the registered one was made knew of the prior unregistered deed. [S. L. n. (P), ante, 625, of this edition]. His Lordship then concluded with the remarks mentioned in a former page, see ante, p. 549, of this edition, *in notis*. Lord Eldon said, that on the best consideration he could give the subject, he had no doubt but the decree in the Exchequer did not bind the remainder-man, for it was clear equitable law, that in order to make a foreclosure valid against all claimants, he who had the first estate of inheritance must be brought before the court, and even then, the intermediate remainder-men for life ought to be brought before the court, to give them an opportunity of paying off the mortgage if they thought proper. A

Foreclosure against tenant for life, not binding on remainder-man.

Judgment in Gore v. Stackpole.

Person having opportunity of discovering fraud, presumed to know it.

Latest general rule as to parties to foreclosure.

bill, may notwithstanding foreclose such defendants as he has brought before the court.

Acquiescence in fraud, binding, when.

Mortgagor executes composition deed, and is afterwards declared bankrupt, collusive foreclosure against assignees only, without trustees of deed, set aside, and mortgagee charged with costs.

bill of review in the Exchequer, to set aside its decree, could not have answered the purpose of the appellant, for as to him this fraudulent decree was an absolute nullity. And as to the lapse of time, Lord Eldon thought the appellant had sued in proper time, unless he had given such encouragement to the respondents (to make them believe themselves secure, and had induced them to improve and deal with the property as if it had been securely their own,) as would make it a fraud in him to prosecute the present claim. [See further as to this, *antea*, 437, 5th edition, n. (H).] This had been alleged by the respondents, and was the only material point on which his noble friend had not touched. Lord Eldon was of opinion, however, that there was no foundation in the case, for any objection on that ground. The judgment of Lord Clare was then reversed, 1 Dow P. C. 32.

The conclusion from these cases is, (what indeed it is almost needless to draw,) that the mortgagor cannot by enveloping the equity of redemption in a deep line of future and contingent limitations, disappoint or postpone the mortgagee of his immediate remedy by foreclosure.

Another late case on the subject of fraud and collusion, in reference to the parties to the bill of foreclosure, may be properly added here. The mortgagor after he had executed a mortgage to the plaintiff, conveyed his equity of redemption to trustees, upon trust to sell for the payment of his debts. Two years after, he became bankrupt, and the assignees, conceiving that some act of bankruptcy had been committed prior to the trust deeds, or that the execution of those deeds was in itself an act of bankruptcy, filed a bill in the Exchequer, for the purpose of having them cancelled, and to restrain the trustees from proceeding for recovery of the rents. In this suit they obtained the common injunction for want of an answer, which, on the answer coming in, was dissolved, and it did not appear that any further proceedings had taken place. The mortgagee then filed a bill of foreclosure against the assignees, as the persons entitled to the equity of redemption, not noticing the trust deeds. In the progress of this suit, a verbal agreement was entered into between the solicitors of the mortgagee and of the assignees, that a decree of foreclosure should be suffered to pass; that a sufficient part of the mortgaged premises should then be sold, to pay what was due on the mortgage, and that the remainder should be given up to the assignees. In consequence of this agreement, a final decree of foreclosure against the assignees was obtained in April, 1813. The answer of the assignees was taken without oath. The bill in the present suit was filed in May, 1813, by the trustees of the composition deed, praying that the decree of foreclosure might be declared void, and that the plaintiffs might be admitted to redeem. It also stated, that the mortgagee had collusively permitted the assignees to receive the rents of the mortgaged premises, and prayed that he might be charged in account with these sums. At the hearing, the counsel for the mortgagee gave up the question as to the plaintiffs right to redeem, and contended merely against being charged with costs. He said, that the mortgagee's reason for not joining the present plaintiffs in his former suit was, that he conceived their deed to be void; and though he was misadvised in this, the court would not go so far as to give costs against a mortgagee, merely from his having proceeded by mistake and having made an erroneous defence. The Master of the Rolls observed, that the defendant's counsel had very properly admitted what had reduced the case to the only real question, that of costs. It was said, indeed, that the mortgagee thought the trust deed void, but if he had entertained that opinion, what injury would it have done him to have made the trustees parties, and so to have given them at least an opportunity of agitating the question? But it was clear that it was not a mistake; if so, how was it that he insisted on the decree in his answers? He might have discovered his error before he had persevered in it for ten years. He negatived their right to redeem, setting up as a bar to them, the decree of foreclosure thus wrongfully obtained. It was impossible to excuse him on the ground of mistake. What motive he may have had to act in favour of the assignees, and to consider them as alone entitled to redeem, did not appear. But if a party would thus conduct himself, what was to be the consequence? It was rightly admitted, that he could not have the benefit of the decree of

But those [incumbrancers who are] not parties to the suit will not be bound by such decree, [and they will be allowed to redeem after the foreclosure has been signed and enrolled] (d), Thus, where R. mortgaged his estate to S. for 99 years, to P. for 40 years, then to T., the plaintiff's husband, for 1500l. and afterwards to B.; B. bought in the two first mortgages; then the plaintiff, administrator, *durante minore etate*, exhibited a bill against R. and B., setting forth a title, to discover the defendant's title and redeem; to which the defendant answered, but no farther proceedings were had by the plaintiff. B. had notice of the plaintiff's title; then B. notwithstanding exhibited a bill against R. alone, to redeem or be precluded, and obtained a decree; during all this time R. was in possession. After preclusion of the defendants of the last bill, C. bought B.'s interest, and then the plaintiff, the widow of T. brought a bill to redeem, to which C. pleaded his purchase and the equity of redemption barred. Upon this state of the case, the question was, whether B. should have made the now plaintiff party to his bill to foreclose, and whether she ought not to be let in to redeem? The Lord Keeper declared, that the case was to be judged by comparing them on both sides, and so choosing the least inconvenient; that it was extremely mischievous to the mortgagee, to make all persons that had interest parties; for by that every mortgagee, in case of several mortgages, would be continually a bailiff, and his work never at an end; but that, on the other hand, though all were not parties, yet those who were omitted would be helped at last, as they would be entitled to their principal, interest, and costs; for they might come in

[1055]
Sed secus of those who are not parties (dd).

[1056]

(d) *Sherman v. Cox*, 3 Ch. Rep. 84. *S. C. Nels. Rep.* 71. [2 Freem. 14.—Ed.]

(dd) [Provided the mortgagee foreclosing, have notice of their liens. *Semb. infra*, 989, of this edit.—Ed.]

foreclosure; of course, it could not bind the plaintiffs, who were wilfully omitted to be made parties to it; nor could it bind the creditors claiming under the deed, and he could not be allowed to tuck to his mortgage debt the costs he incurred by that proceeding, as against those who were entitled to redeem. As to so much of the suit, therefore, in which the plaintiffs' right to redemption was controverted on the ground of the foreclosure, and all the evidence rendered necessary by that resistance on the part of the defendant, he (being wrong in it) ought to pay. Beyond that, however, he was not bound to pay; he was entitled to receive his costs, as to so much of the suit as was necessary for the redemption. And one of the defendants (the assignee of the bankrupt) having been examined as a witness on the part of the plaintiff, to prove the fraud of the other defendant, his Honour declared, that his costs should be borne by the plaintiff, for it was principally by this evidence that he obtained the decree in his favour, and the expence of examining this witness was not a necessary result of the former conclusion. The decree was accordingly. *Harvey v. Tebbutt*, 1 Jac. & Walk. 197. *S. C. infra*, p. 1068, 11th section of note there.

But costs of examining defendant as witness to be paid by mortgagor.

as to the first, second, third, or fourth mortgagees, whereas, if the plaintiff should *not* be relieved, it would be irreparable loss and ruin; and trouble and pain being less prejudicial than ruin and total loss, his Lordship over-ruled the plea.

Mortgagee's heir unnecessary party to bill of foreclosure by his devisee.

If there be tenant for life, reversion in fee, and he in reversion mortgages his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor (*e*), and need not make the heir of the devisor a party; because he hath no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor (*ee*).

[1057]
Infant sometimes foreclosed.

It was said in the case of *Sale v. Freeland* and others, infants, on a bill to redeem a mortgage made by the father of the defendants, or be foreclosed, that the court would sometimes decree infants to be foreclosed before they came of age (*g*).

But now he must have day when of age, to shew cause.

But the interest of infants is so far regarded and taken care of, in the court of Chancery, that no decree to foreclose can be made against them (*h*), without giving them a day to shew cause against it when they come of age. Thus, upon a bill brought to oblige an infant to redeem a mortgage (*i*); upon the hearing, it was decreed to an account, and the infant to pay what should be reported due, *unless cause, &c.*

[1058]

The words of such decree are thus (*k*): "And this decree is to be binding to the said J. S., the infant, unless he shall, within six months after he shall attain the age of twenty-one years (being served with process for that purpose) show unto the court good cause to the contrary."

No cause shewn, decree made absolute.

If he show no cause (*l*), the decree is made absolute upon him; but when he comes of age, and shews cause within the six months (*m*), he may, upon motion, put in a new answer, and make a new defence (*n*); for it would be to no purpose to

(*e*) *How v. Figures*, 1 Eq. Ca. Abr. 518, pl. 5. [supra, 439. 452, et vide *S. L. Skipp v. Wyatt*, 1 Cox, 353, infra, 1068, in *notis*, s. 11.—*Ed.*]

(*ee*) [In this case it is necessary that the devisee have both the land and money. As to the mortgagor's devisee, see *antea*, p. 968, n. (L), of this edition.—*Ed.*]

(*g*) *Sale v. Freeland*, 2 Vent. 351. [et vide infra, 1062, in *notis*.—*Ed.*]

(*h*) Per *Ld. Chan.* 2 Vern. 342.

Booth v. Rich, 1 Vern. 295. *Gundry v. Baynard*, 2 Vern. 479. *Taylor v. Philips*, 2 Ves. 23. *Cook v. Parsons*, Pre. Ch. 185. [S. C. 2 Vern. 429.—*Ed.*]

(*i*) *Bennet v. Edwards*, 2 Vern. 392. *Leving v. Lady Caverly*, Pre. Ch. 229.

(*k*) 5 Bacon's Abr. 148.

(*l*) *Ibid.*

(*m*) *Bennet v. Lee*, 2 Atk. 532.

(R) So an infant defendant may, before he attain twenty-one, amend his answer, and go into a new defence. *Savage v. Carroll*, 1 Ball & Bea. 548.

give him a day to shew cause, if the infant notwithstanding was concluded by what his guardian had done, who may have made an improper defence, or may have mistaken the nature of his case (n).

This process is, by way of *subpœna*, to be served on the defendant on his coming of age, and is a judicial writ, and must be returned in term time, If the infant shews no cause, [1059] the decree is made absolute (nn)(s).

(n) *Fountain v. Caine and Jeffs*, 3 Bro. P. C. 301. S. C. 2 P. Wms. 1 P. Wms. 501. [S. C. Mos. 66. 306. 401. [S. C. ante, 871, of this edition, text.—Ed.]
 313.—Ed.] *Lady Effingham, Ex. of Lord Howard v. Sir John Napier*, (nn) [Gillb. For. Rom. 160.—Ed.]

(S) Where on a decree of foreclosure an infant had a day to shew cause, and, before he was served with a subpœna, he left the kingdom, to avoid his creditors; Lord Thurlow would not allow a service of the subpœna on his clerk in court to be a good service; but thought that it must be personal, or that it should be fully proved that he had left the kingdom, or had absconded to avoid the service. Afterwards, an affidavit having been made that the defendant was greatly indebted to divers persons, and that he had declared it was his intention to leave the kingdom to avoid his creditors, the Lords Commissioners, without the least hesitation, granted the motion. *Eloock v. Glegg*, 2 Dick. 764.

Service of subpœna on infant must be personal, unless he abscond.

As to service of the subpœna when the defendant is abroad, it was in one case held, that service on a person who transacted business under a letter of attorney, from the defendant, should be deemed good service on the defendant, *Carter v. De Brune*, 1 Dick. 39. And, in another case, it was ordered by Lord Hardwicke, that service of a subpœna to appear and answer, on the agent or factor in England of a defendant who resided in Jamaica, should be good service.

Service on agent or factor, good.

In *Wellins v. Lemans*, 2 Dick. 579, a mortgagor, who had been so long out of the kingdom as not to come within the act of 5 Geo. 3, ubi infra, agreed before he left the kingdom, by indorsement on the mortgage deed, that in case he should not redeem by a limited time therein mentioned, that two persons therein named for the purpose, should accept a subpœna for him to appear and answer any bill that should be filed against him touching the mortgage. The plaintiff filed his bill to foreclose, and applied to serve the persons named in the said indorsement with a subpœna to appear, and that such service might be deemed good on the defendant. After standing over for consideration, Lord Thurlow refused the motion, as did Lord Kenyon, sitting for the Chancellor on a future day when the motion came on in another shape.

Mortgagor agrees that service on A. shall be good, nevertheless substituted service on him, refused.

In *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 238, the defendant, residing out of the jurisdiction, had given a power of attorney to P. to act for him in the management of his affairs; the court refused to allow substitution of service of subpœna to appear and answer, on P., instead of on the defendant, Lord Redesdale observing, that this question had been argued before Lord Thurlow, on these circumstances:—A person executing a mortgage, inserted a covenant, that if the mortgagee should be desirous of filing a bill of foreclosure after a certain time, service of the subpœna on a person there named, should be good service; and, on that ground, an application was made to Lord Thurlow, to substitute service, the mortgagor having gone to the East Indies. But the answer of Lord Thurlow was, "I can no more try the fact whether there is such a covenant, without having the party before me, than I can decide any other facts without the parties being before me." And Lord Redesdale remembered the reasoning on the subject to be this, that the substitution of service, directed by the legislature in several cases, would be quite unnecessary, if this practice were allowed. The case, he added, was discussed with a considerable degree of attention, and he should imagine, that the cases published by Mr. Dickens were cited; but Lord Hardwicke himself must have altered

So service on person having general power, now disallowed.

Infant cannot open redemption or account,

But when he comes of age, he will not be permitted to go into the account (o), nor will he be so much as entitled to re-

(o) *Mallack v. Galton*, 3 P. Wms. 352. [S. C. Dick. 65, et infra, 1062.—Ed.]

Practice when one party is out of jurisdiction.

his opinion since the time when those cases were decided. Mr. Dickens was a very attentive and diligent Register, but his notes, being rather loose, were not considered as of very high authority; he was constantly applied to, to know if he had any thing on such and such subjects in his notes; but if he had, the Register books were always referred to.

Lord Redesdale further remarked, that the ordinary practice of courts of equity in England, when one party was out of the jurisdiction, and other parties within it, was, to charge the fact in the bill, that such a person was out of the jurisdiction, and then the court would proceed against the other parties. It could not proceed to compel the party out of the realm to do any act, but it could proceed against the other parties, and if the disposition of the property was in the power of those parties, the court might act upon it. His Lordship remembered a case which he thought was reported in Brown [vide *Williams v. Wingates*, 2 Bro. C. C. 399] where a bill was filed to sell an estate for payment of debts, and the heir at law, who was entitled to the surplus after payment of the debts, was out of the jurisdiction. The court ordered the estate to be sold for payment of the debts; adding, that the heir might file a bill to set aside the proceedings if they were erroneous: and the heir at law had a mother and sister living in England, who were in the habit of corresponding with him; yet there was no conception of substituting service. 1 Sch. & Lef. 241.

Sequestration, penalty for absconding to avoid process.

Where a person does not enter an appearance within the usual time after a subpoena issues, and is justly suspected to have absconded for the purpose of avoiding the process, the court, out of which such process issues, is authorized to fix a day for his appearance, to be inserted in the London Gazette, and published on the Lord's day in the parish church of the defendant; and a copy of the order of the court is to be posted up at some public place at the Royal Exchange in London; and, on the defendant's not appearing in the time limited, the Court may order the plaintiff's bill to be taken *pro confesso*, the defendant's estate or effects to be sequestered, and the plaintiff's demand to be satisfied thereout. 5th Geo. 2. c. 25, s. 1. The eighth section of the act requires an affidavit that the defendant has been in the kingdom within two years before the subpoena issued; but where a person had been abroad upwards of two years, and had been outlawed, a motion was allowed upon the equity of the statute, that the defendant should appear to the subpoena within a limited time, upon an affidavit that the defendant continued abroad to avoid process. *Clarke v. Wright*, 2 Ves. jun. 188; sed vide *Neale v. Norris*, 5 ib. 1.

Irish act for making process effectual against mortgagor's absconding.

By the Irish act for the relief of mortgagees, and for making the process in courts of equity more effectual against mortgagors who abscond and cannot be served therewith, and against persons, who, being served, refuse to appear, (7 Geo. 2. c. 14. Irish stat.) it is provided, (sec. 2) that if any person shall file a bill of foreclosure in any court of equity in Ireland, against any person having an estate and not being resident therein; in case it shall appear, by affidavit to the court, that such defendant is out of the said kingdom, and has been so for twelve months next preceding such affidavit, it shall be lawful for the court to order, that service of a subpoena to appear and answer upon the steward, agent, receiver, or manager of the said defendant, and leaving a copy thereof at his last place of abode in Ireland, be deemed good service; and on the defendant refusing to appear within four terms after such service, the plaintiff shall be at liberty to proceed in his suit, to have his bill taken *pro confesso*, in the same manner as if the defendant had appeared. Sec. 8. provides a saving for infants, persons of non-sane memory, and feme covert, who are allowed two years from the time of serving the decree, after disability removed, to make their defence. The case of *Carew v. Johnston*, 2 Sch. & Lef. 280, was decided in part on this latter section.—Vide infra, page 1062, in the text, and second note there, for further on the subject of sequestration. See also as to the service of the subpoena, 2 Madd. Ch. 196. 2d edit. and *Ellis v. King*, 5 Madd. Rep. 21.

deem the mortgage, by paying what is reported due; but *will be only entitled to shew an error in the decree, or that it was unjust*; this was admitted as law, by the counsel on both sides, in the case of *Lyne v. Willis*, 18th May, 1730. (oo).

but may impeach decree (T).

And where the mortgage depended upon a disputable title *viz.* whether the ancestor of the infants had executed a power, out of which his right to mortgage arose, and so no money could be expected upon assignment of it over; the court would not decree the infants to be foreclosed until they came of age (p).

No decree against infant if mortgage be on disputable title.

It is said, the proper way, in case of an infant, is to apply for a decree, that the lands may be sold to pay the debts, and that will bind him (g); for in that case, no forfeiture will incur to him, as the surplus will be his, after the debts paid. But even then, if he be decreed to *join* in the conveyance, he must have a day after he comes of age (r); for there is no other way than this, for the infant to set forth his title, which he ought to have an opportunity of doing (v).

Proper way in case of infancy is to pray sale (pp).

[1060]

(oo) [S. C. 3 P. Wms. 352, n. (B). and S. L. infra, 1060, in *notis.*—Ed.]

(p) *Sale v. Freeland*, 2 Vent. 351, supra, [1057, et vide *Spencer v. Boyes*, 4 Ves. 370. S. C. antea, p. 258, of this edition, n. (L), where the Master of the Rolls refused to foreclose an infant till he was twenty-one, and though he held the infant bound by the covenant for further assurance, his Honour would not direct him to make good the mortgage until he attained his age.—Ed.]

(pp) [The modern way is to pray a sale or foreclosure in the alternative; see infra, p. 985, of this edition, n. (Z).—Ed.]

(g) *Booth v. Rich*, 1 Vern. 295, supra, 289, [1037, and for further instances where sale may be prayed, instead of a foreclosure, infra, 1093 to 1096.—Ed.]

(r) *Cook v. Parsons*, 2 Vern. 429. Pre. Ch. 184, 5. *Fountain v. Caine*, 3 P. Wms. 504.

(T) This doctrine seems confirmed by the following case of *Richmond v. Taylour*, where a decree by consent had been obtained, to the prejudice of an infant, and no day given for him to shew cause when of age. The infant having obtained twenty-one, filed a bill to be relieved against the decree, and to set the same aside. Lord Macclesfield held, that where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction from his guardian, or he may bring his bill to be relieved, on the head of fraud; but if no fraud appear in obtaining the decree, the plaintiff will be barred thereby; on that ground he ordered the bill in the case before him to be dismissed. *Richmond v. Taylour*, 1 Dick. 38. S. C. 1 P. W. 734. 2 Eq. Abr. 516, pl. 9. But it should be added, that the infant is now always allowed a day to shew cause, infra, 1062. It is merely necessary to add, that if a decree has been obtained against an infant which is erroneous, and the error is not in the judgment of the court, but in the facts on which the judgment is founded, the manner in which the infant may proceed to investigate the decree, (and which he may do during his infancy, or afterwards,) is generally by original bill. *Carew v. Johnston*; 2 Sch. & Lef. 292.

Infant may have satisfaction against guardian for injurious decree, or set it aside for fraud.

(U) "One great fault of Vernon's Report of this case is, that it does not state the rule of the court clearly; for an infant may be foreclosed. You can have your decree against him. He can do nothing but shew error. He is foreclosed to all intents. You may go to market with it; and the purchaser

An infant may be foreclosed, subject only to error, and fore-

But sale subject to review when infant of age.

But, if the mortgagee or his alienee be satisfied (s), and does not require that the infant should be a party to the sale; in such case, the legal title being in the mortgagee, and the infant having a mere equity; the decree for sale, the infant being no party, may be made without a day to shew cause, but then the case will be open to investigation, when the infant attains his age (x).

Infant plaintiff bound by decree in his own suit.

But, a court of equity, where an infant is plaintiff, follows the rule of law, where it is held that he is as much bound by a judgment in his own action, as if of full age (t); and, accordingly, in a suit of equity, where an infant is plaintiff, he is as much bound, and as little privileged, as one of full age (v). And this rule is general, unless gross laches, or fraud and collusion, appear in the *prochein amy*, then the infant might open a decree by a new bill.

[1061]

This rule invaded on slight grounds. *Semb.*

Lord Hardwicke, in the case of *Gregory v. Molesworth* (u), wherein he assented to the rule last-mentioned, observed, that

(s) *Cook v. Parsons*, 2 Vern. 429.
Vide 9 Mod. 128.

(t) 2 P. Wms. 519. 3 Atk. 627.
(u) 3 Atk. 627.

closure no error in itself.

is only liable to be over-hauled in the account," per Lord Alvanley, M. R. in *Bp. of Winchester v. Beavor*, 3 Ves. 317. Et vide *S. L. Mallack v. Galton*, supra, 1059. In *Williamson v. Gordon*, 19 Ves. 114, the bill prayed a foreclosure; and the usual decree was made for an account, declaring also that the infants should be foreclosed, unless on being respectively served with a subpoena, they should, within six months after they attained their respective ages of twenty-one years, shew good cause to the contrary. The Master, by his report, stated what was due in the usual manner, and appointed a time and place for payment. Upon affidavit, that no one attended on behalf of the defendants, at the time and place specified, an order was made to make the decree absolute; which, as drawn up, went no further than to declare, that the decree should be absolute against such of the defendants as were adult; but was silent as to the infants. The motion was, that the clause making the decree absolute against the adults should be repeated as to the infants, with the additional clause in the original decree, giving them six months after they became of age to shew cause. The counsel for the infants admitted, that though there was no precedent to be found of an absolute decree of foreclosure against an infant; yet, upon principle, it could not be disputed that it would be very mischievous, if an infant could be foreclosed; and the repetition of the declaration, which was necessary as against the adults, to shew that the account had been taken, seemed equally necessary with reference to the infants. Lord Eldon said, that he always understood, that infancy did not operate to prevent a decree of foreclosure; that the infant had only six months to shew cause against the decree; but he could not do that, if the decree would have been right against him had he been adult: he could shew nothing but error in the decree; and a decree of foreclosure was not error in itself. An order was then made for varying the minutes of the decree by adding the clause above-mentioned. 19 Ves. 114.

(X) By Mr. Raithby's note to the case of *Cook v. Parsons*, the above does not appear to have been the exact point of the case. The validity of the mortgagor's will was disputed, and errors were alleged in the decree,—as that some lands, directed by the will to be let and set only, were by the decree ordered to be sold. See Raithby's Vern. n. (2.).

(Y) But the court will take care that the infant does not make any injurious submission by his bill, and will, if necessary, when the cause is brought on, allow him to amend his bill, on paying the costs of the day, *Serie v. St. Eloy*, 2 P. Wms. 387.

he knew but of one case that was an exception; that of *Lady Effingham v. Sir John Napper*, where, upon an appeal from Lord Macclesfield's decree, with regard to real estate (x), the House of Lords gave Sir John Napper leave to shew cause when he came of age, against his own decree. But it is observable that the cause alluded to was instituted on the ground of undue influence, which is a species of fraud. However, since such decision has been made against the rule on appeal to this high jurisdiction, it may be at least questionable whether a court of equity would not be induced on slight grounds to admit an infant to shew cause against a decree in his own suit respecting his real estate; although they might decide otherwise, as to suits, with regard to his personal estate, or respecting his maintenance, education, or the like, from the mischiefs that would be incident to suffering him, by a new bill, to dispute proceedings in those respects (z).

[1062]

(x) 2 P. Wms. 401. 3 Bro. P. C. 1.

(Z) The following cases have also been decided on the subject of foreclosing infants. In *Adams v. Gould*, 2 Dick. 443, Lord Bathurst, C., after much consideration, held that the defendant, an infant, who was the devisee of the equity of redemption of a copyhold estate, and decreed to join in a sale at twenty-one, was at liberty to shew cause against it when he attained the age of twenty-one; and it was ordered that the infant should be served with a subpoena for that purpose.

Infant decreed to convey when of age, with liberty to shew cause against it then.

In *Goodier v. Ashton*, 18 Ves. 83, the bill prayed a foreclosure against an infant mortgagor. The mortgagee proposed a sale, as more advantageous to the infant; to which proposal Mr. Wetherell, the counsel for the infant, acceded, but suggested the propriety of a reference to the Master, to enquire whether it would be for the infant's advantage. Sir Wm. Grant, M. R. said, that the modern practice was to foreclose infants, and he would not make the precedent, if no instance could be found in which the case cited (*Booth v. Rich*,) had been followed. The usual decree was made for a foreclosure, with a day to shew cause.—This case, however, has not been followed; and a late decision has preferred the suggestion of Mr. Wetherell, though it may be questioned whether the practice, as stated by Sir Wm. Grant, would have been altered, if his observations had been submitted to the attention of the Chancellor. The case of *Goodier v. Ashton*, though prior in point of time, was not reported until after the determination in the next-mentioned case, viz. that of *Monday v. Monday*, 1 Ves. & Bea. 223, where Lord Eldon said, it would be too much to let an infant be foreclosed, when, if the mortgagee will consent to a sale, a surplus may be got of perhaps 4000*l.*, for the benefit of the infant. If there were no precedent, his Lordship would make one: but he was sure this had been done. The decree directed a reference to the Master, to take an account of the monies due to the several incumbrancers; and to ascertain and report their several priorities, with directions for the subsequent incumbrancers to redeem the prior, in the usual course; and, in case the mortgagee should consent to a sale, that the Master should inquire and report whether it would be for the benefit of the infant that the estate should be sold; and further directions and costs were reserved.

Infant may be foreclosed.

But most modern practice is a reference (with consent of mortgagee) whether sale will be beneficial to infant.

If the mortgagee will not consent to a reference, he may foreclose the infant; but in that case, the rule is, that the infant shall have a day to shew cause against the decree within six months after his coming of age, and a decree, omitting that provision, will be erroneous, *Savage v. Carroll*, 1 Ball & Bea. 551. When a sale is ordered, all proper parties are directed to join in the conveyance; but whether in this case, as on a foreclosure, the infant

Decree of foreclosure, omitting to give infant six months to shew cause, erroneous.

*Coverture no
impediment to
foreclosure.*

It is said, that if a woman, before her marriage, or the ancestors of a woman, mortgage lands, and the equity of redemption thereof vest in her, being a *feme covert*; upon a bill brought by a mortgagee to foreclose (y), she is liable to be absolutely foreclosed, though the procedure be during the coverture; and it is certain, that she shall have no day given to her, or her heirs, to redeem after the coverture shall be determined (A).

*Infancy and co-
verture distin-
guished in this
respect.*

[1063]

This distinction between the case of a *feme covert* and of an infant, as to a day to shew cause, results, I apprehend, from the different causes which give rise to their respective disabilities, and from the duration of those disabilities (z). The disability of infants is the consequence of a privilege given them by law, for their protection, founded on the natural inability which is presumed to attend persons of tender years, to act for themselves, and which determines with their minority. That of *femes covert* is an absolute incapacity, arising from their having lost, by coverture, all powers of acting for themselves; the law considering them as having *voluntarily* delegated their rights to their husbands, or rather, that their rights are merged in those of their husbands. The law, therefore, considers an infant as incapable of doing *no binding act* during a certain definite period, *unless* it be evidently for his own good; but from a *feme covert*, the law takes the right of acting respecting her civil concerns; and having invested the husband with the right of acting for her, leaves her liable to the consequences of his neglect, if there be no fraud. The right, therefore, to shew cause against a decree of foreclosure, made during in-

(y) *Mallack v. Galton*, 3 P. Wms. 352. [S. C. 1 Dick. 65, et supra, 1059.—Ed.]

(z) Vide Hob. 95. 1 Ves. 305. 10 Co. Rep. 43.a. 3 Atk. 712. 1 Inst. 246. 403.

will be allowed six months after his age of twenty-one to shew cause against the sale, and whether a decree, omitting to specify the allowance of that time, will be erroneous, has not been decided; but the case of *Savage v. Carroll*, ubi supra, may by anticipation, afford an affirmative answer to these questions. In *Gore v. Stackpole*, 1 Dow. P. C. 18. S. C. antea, 976, of this edition, n. (Q), the sale was not effected till after the infant became of age; but it is presumed, that when the Master has made his report that a sale will be beneficial to the infant, and a sale has been directed accordingly, it may take place at any time during the infancy, and, if fairly proceeded in, it cannot afterwards be impeached by the infant when he arrives at the age of twenty-one years and executes the conveyance.

(A) If a *feme sole* mortgagee marry, and her husband files a bill of foreclosure, the court will not compel the mortgagor to pay the money to the husband without his making some provision for his wife; or at least the wife, by an application to the court against the husband and the mortgagor, may prevent the payment of the money to the husband, unless some provision be made for her. *Bosville v. Brander*, 1 P. Wms. 458. This subject has been treated of antea, 754, of this edition, et seq.

*Feme covert
mortgagee en-
titled to provi-
sion.*

fancy, after the infant attains his full age, is, in equity, analogous to the privilege he hath at common law, on an action brought in relation to his inheritance, the decision upon which would be a perpetual bar to him, to pray the *parol* to demur; for, as in such case, at law, he was not permitted to go on, but for the tenderness of his years (in respect whereof the law inferred want of understanding in him) and for his benefit, that he might not be prejudiced in his estate, the court gave an interlocutory judgment, that the suit should remain over, until he attained his full age; so, in equity, though in respect of the original contract, and the right of the mortgagee to his money, and to enable him to procure it, a decree to foreclose is not stayed, yet the rights of the parties remain just as they were, until he attains his age; when, if any reason existed at the time of foreclosure, which, if urged to the court, would have been a ground for refusing it, he may take advantage of that, and have it opened (a); but the *parol* never demurred on account of coverture, for there was no natural incapacity to act in the wife, but a legal disability; she having delegated her power to another by her own act, and, thereby, made herself liable to the consequences thereof; and it would have been repugnant to every principle of equity, that the mortgagee, who lent his money under a stipulation to be repaid at a time certain, for the performance of which the land was bound, should, by the accident of coverture, have been hung up for an indefinite period of time, to be determined by the death of the husband; for this differs from the case, where husband and wife have a right of entry, which, if lost by the neglect of the husband, will be renewed in the wife after his death: as there the right to the lands is in the wife, and comes to her at a period when, by her incapacity, she cannot avail herself of her right of entry, as the means of recovering her estate, and no person is injured thereby; but in the case of a mortgage, the right to the lands, in law, is vested in the mortgagee, by the contract of the parties, for want of performance of the condition; and the court is only called upon, to enforce the contract, by closing the equity of redemption, without which the mortgagee can neither get his money, nor safely intermeddle with the land.

[1064]

Marriage a voluntary act, which should not prejudice mortgagee.

[1065]

But, although a *feme covert* shall not have a positive day given to her, on which she may shew cause against the decree (b), as an infant shall, yet, I apprehend, if a bill be

Wife, after husband's death, may examine decree made during coverture. Semb.

(a) Co. Litt. 246.

(b) Gilb. For. Rom. 161. *Evans v.**Logan*, et vide 2 P. Wms. 450. 3 P. Wms. 238.

[1066]

brought against her and her husband, during coverture, respecting her inheritance, which she claims *merely* in her right, and he afterwards dies, the right surviving to her, she may draw into question and examination the validity of the decree obtained against her during coverture, and avoid and reverse it, if there be *just cause* so to do.

Mortgagor on foreclosure, decreed to make best title he can (n).

Mr. Justice Wright observed, in the case of *Sutton v. Stone* (c) that he did not apprehend the court of Chancery would point out what title the mortgagor should make on a bill to foreclose, but would decree him to make such title to the mortgagee as he was capable of doing: And thereupon, in the case in question, he directed a good title to be made by the defendant to the plaintiff, and the principal, interest, and costs on the mortgage to be paid in six months, or the defendant to stand absolutely foreclosed.

Foreclosure, pending suit by creditors for sale, may be opened by them.

[1067]

If there be any unfair conduct in the mortgagee, the court will open the foreclosure. Thus, where a mortgagee obtained a decree to foreclose the mortgagor (d), pending a suit by his creditors to have the estate sold for payment of their debts; the court decreed, that the creditors should redeem upon payment of principal, interest, and costs, to the mortgagee, and referred it to a master to take an account thereof, and directed that the lands should be sold to pay the creditors.

Foreclosure after notice of judgments, and tender of money, had against creditors.

So, if there be a mortgagee, and several judgment creditors, and the persons to whom the judgments are given, give the mortgagee notice thereof, and tender him payment (e); if the

(c) 2 Atk. 101. [S. C. antea, 975, of this edition, n. (b).—Ed.]

(d) *Solely v. Salisbury*, 9 Mod. 153. S. C. 2 Eq. Ca. Abr. 600, pl. 25, [et vide distinction as to allowing interest, on suit for sale by creditors and bill of foreclosure, antea, of this

edition, p. 978, in the text.—Ed.]

(e) *Gresswell v. Marsham*, 2 Ch. Ca. 170. [S. C. 298, of this edition, and acknowledged as good law, antea, 551, of this edition, n. (8), et vide for general rule. antea, 977, of this edition, text.—Ed.]

Conveyance after foreclosure necessary only when mortgagor's title defective.

(B) That is, if the title to the mortgage be defective, otherwise a conveyance cannot be necessary, though it be sometimes taken, see antea, 305, of this edition, n. (F). In *Pye v. Daubus*, 3 Bro. C. C. 593; S. C. 2 Dick. 759, a tenant in tail made a mortgage in fee, and then became bankrupt, his assignees were decreed to redeem, or stand foreclosed; in which latter case they were ordered to "execute proper conveyances of the mortgaged premises to the plaintiff and his heirs, of so much of the estates comprised in the indentures of lease and release, as was vested in them as assignees under the commission of bankruptcy against Benjamin Nankwell." See this case antea, p. 194, of this edition, in the text. In an *Anonymous case*, 2 Ch. Ca. 244, it was said that the court would go no further than to take away the equity of redemption, but would leave the plaintiff to such title as he had, and would not amend it; and that this was the true and ancient course, though it was added that the contrary had then of late been sometimes done. And the Lord Chancellor agreed thereto, and discharged the contempt for not delivering possession after a foreclosure of the equity of redemption. Et vide S. C. antea, 965, of this edition, n. (i).

mortgagee, afterwards, obtain a decree to foreclose, the court will, upon a bill filed by the judgment creditors, open the foreclosure, and decree them their money.

But if the mortgagee had no actual notice of the judgment, the decree to foreclose would bind the judgment creditor (*f*). *Sed quare*, for, in the principal case, the mortgagee purchased (*c*). *Contra if mortgagee have no notice. Sed quare.*

(*f*) *Greenwood v. Marsham*, 2 Ch. Ca. 170, *supra*.

(C) This subject has been anticipated, see *ante*, of this edition, p. 306, n. (G), and 551, n. (S). It is merely necessary to remark here, that no decision has occurred to reconcile the conflicting cases of *Merrett v. Western*, and *Godfrey v. Chadwell*, or to determine the question, whether it be necessary to make all incumbrancers, who have acquired liens on the estate between the execution of the mortgage and the filing of the bill, parties to the foreclosure? Mr. Maddock states the general opinion of the profession to be, that they are necessary parties. 2 Madd. Ch. 168, 2d edition. In the n. (G), *ubi supra*, it is submitted, that those only are requisite defendants who have liens on the estate and of whose incumbrances the mortgagee has notice; and if that doctrine cannot be maintained, a distinction is suggested (p. 307, of this edition), which is entitled to attentive consideration. The unreasonableness of the doctrine—that the mortgagee is to search out all incumbrances on the equity of redemption subsequent to his mortgage, is sufficient to condemn it. The more equitable proposition seems to be, that since a suit for foreclosure is a transaction in a sovereign court of justice, with which the whole kingdom is presumed to be acquainted (*supra*, p. 543, of this edition, in the text), the subsequent incumbrancers should be taken to be apprised of it, and then, if they are inclined to redeem, they may file bills accordingly. The following case falls within the spirit of this proposition, and tends to shew that those incumbrancers only are necessary parties to the foreclosure, of whose charges the mortgagee has notice.

The bill in the case alluded to was filed by the first mortgagee against the mortgagor and the second mortgagee for a foreclosure. Both the mortgages were in fee; the first made in 1792, the second in 1795. The answer of the mortgagor stated a judgment entered up against him by one Jones, in Trinity Term 1794, and that there was no other incumbrance. The second mortgagee objected at the hearing that the judgment creditor was not made a party, but the Master of the Rolls inclined against the objection; stating the inconvenience that would arise from the necessity of making all the judgment creditors of the mortgagor parties to a bill of foreclosure; for if that were requisite, the mortgagor might keep off the decree by confessing a great number of judgments to his friends. The point being of importance, and the practice insisted on, the case stood over for argument. On a future day it was contended, in support of the objection, that a judgment creditor having a general, though not a specific, lien, had a right to foreclose as a mortgagee; that the present case was not a question of strict law, but of convenience on both sides; that in all bills of this kind there was an interrogatory, whether there were any and what incumbrances, and if the answer stated any, it had always been the practice to make them parties; that if the first incumbrancer brought a bill against the mortgagor alone, and there appeared to be an intervening incumbrancer, the court would not proceed against the mortgagor alone; that the difficulty in the present instance to the first mortgagee was nothing; for it was stated on the records, that there was no other incumbrancer than the one mentioned; and that as to the inconvenience mentioned by the court, if the mortgagor confessed judgments *pendente lite*, they would be good for nothing. Lord Alvanley, M. R. then said, that he would put the objection he had stated on a former day out of the case. A judgment confessed *after* a bill filed would not do; the judgment creditor had no right to insist on the equity certainly. The mortgagor however might be advised to confess twenty judgments at the time of making the mortgage, in order to guard against foreclosure. But an inconvenient

Those incumbrancers only, necessary parties, of whose liens mortgagee has notice. See.

Court would not adopt as general rule, practice of making all incumbrancers parties.

Judgment confessed after bill, creditor no equity to be party.

the estate, after foreclosure, for a farther sum of money; and, in the case of *Godfrey v. Chadwell*, it was held (g), that a

(g) 2 Vern. 601, et vide *Morret v. Westerne*, supra, [306, of this edition, text. S. C. 2 Freem. 14.—Ed.]

But those noticed in answer are necessary parties.

ence had struck his Lordship on the other side—to whom was the equity of redemption to be given? If to the mortgagor, that would cut out the intervening incumbrancer, and give the mortgagor the legal estate to keep him off with. That was a difficulty not touched upon, and which his Lordship could not get over. Certainly the common practice was to make all the incumbrancers parties. Unless cases could be adduced, Lord Alvanley would not travel into the question, or vary what seemed to have been the course of the court in this instance, where there was but one incumbrancer whose lien appeared by the answer. His Lordship was perfectly satisfied that the general course and practice of the court was to insist upon any one having a right to redeem being made a party; and the principal reason was the gross injustice in compelling a mortgagee to re-convey to a mortgagor, when it appeared by his own answer he had no right to it.

The conclusion of Lord Alvanley's judgment was as follows:—"Where there is only one single incumbrancer, what occasion is there to go out of the common rule? The usual and common practice, almost without exception, is to make all incumbrancers parties. If I lay down that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case? I think it would be too much to refuse it, where there is no affectation of delay that I can see. I do not think the general point so clear as to determine it upon this case; I hope the court is not bound to insist upon all incumbrancers being parties. But I am perfectly satisfied that in this case it is by much the least evil to order the cause to stand over till this single incumbrancer is made a party," which was accordingly done. *Bp. of Winchester v. Beavor*, 3 Ves. 317.

Observations on preceding case.

The conclusion from this case is, that the general practice here spoken of by Lord Alvanley, and adopted by Mr. Maddocks, is not supported by any direct authority, and it is observable, that Lord Alvanley in the above case, most cautiously refrained from stating that every incumbrancer not appearing on the records was a necessary party to a bill of foreclosure. The case, therefore, rests upon principle, and it is scarcely requisite to remark, that of those incumbrancers whose liens appear by the answer, the mortgagee will thereby acquire notice, and as to them he must move for time to amend his bill, by making them defendants to his suit. Et vide *Palk v. Clinton*, 12 Ves. 58, where it was made a question whether all incumbrances were necessary parties to a bill of foreclosure, but the point was left undecided. See also antea, p. 951, of this edition, where it is laid down that the mortgagee will not be obliged to account for rents and profits received, or which he might have received as against other incumbrancers unless he have notice of their claims, which would involve a singular anomaly, if it be law that he is to make them parties to his bill of foreclosure, whether he have notice of their incumbrances or not.

Of incumbrancers becoming such before mortgage, or after filing of bill.

Incumbrancers before the making of the mortgage will of course have the same lien against the estate after foreclosure as they had before; and it seems clear, that as to incumbrancers becoming such after the bill of foreclosure has been filed, they will be bound by the decree, and need not be made parties, whether the mortgagee have notice of them or not, for an alienation pending a suit is void, or rather voidable. *Walker v. Smallwood*, Amb. 676. *Gaskill v. Durdin*, 2 Ball & Bea. 167. S. C. and P. 542, of this edition, in *notis*, and *Moore v. Macnamara*, 1 Ball & Bea. 309. If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff mortgagee need not make the creditor, incumbrancer, or assignee parties, for they will be bound by the suit; and a purchaser who took an objection to a title, that two mortgages (who became such after the bill filed) were made no parties to the foreclosure, was condemned with costs. See *Bp. of Winchester v. Paine*, 11 Ves. 199. S. C. antea, 548, of this edition, n. (k), over-ruling *Crisp v. Heath*, 7 Vin. Abr. 54.

second mortgagee might redeem the first, after a decree obtained by him to foreclose, although the first mortgagee had no notice of the second mortgage before the decree. [1068]

But the first mortgagee shall be allowed all his expences out of pocket. Thus, where L., a second mortgagee (*h*), came to redeem H., who had been at great expences in law-suits to foreclose the mortgagor, and otherwise, in relation to the estate, the court ordered that his costs should not be taxed, as in an

First mortgagee redeemed by second, allowed all expences, and not confined to taxed costs (D).

(*h*) *Lomax v. Hide*, 2 Vern. 185.

pl. 2, to the contrary. See also 3 Ves. 315, and *Garth v. Ward*, 2 Atk. 174, and *Metcalf v. Pulvertoft*, 2 Ves. & Bea. 207, where it was expressly acknowledged by the Court, that a judgment confessed after a bill of foreclosure will be ineffectual against the plaintiff. See *vide* what is said by Lord Eldon in *Daly v. Kelly*, 4 Dow. P. C. 435, that if land be aliened pending a suit in equity about it, though this will not prejudice the plaintiff, the alienee ought to be brought before the Court. But his Lordship added, "if there are vexatious alienations pending a suit, the Court will restrain them," *ib.* 440.

(D) A reference was made to this place from a former page (*antea*, 337, of this edition, n. (S) for the modern decisions on the subject of costs. It is therefore proposed to run through the leading authorities on that head here, though they may not be exactly relevant to the doctrine under consideration.

In the 1st place it may be observed, that a mortgagee will be allowed the costs of procuring letters of administration to an incumbrancer, whom the will of the mortgagor has made a necessary party to the bill of foreclosure. Thus in *Hunt v. Founes*, 9 Ves. 70. a bill of foreclosure had been filed by a mortgagee in fee against a devisee for life and a devisee in remainder under the will of the mortgagor, the heir at law, and an annuitant of 20*l.* under the will. In 1779, the usual decree *nisi* was made; and in 1787 the decree was made absolute against the devisee for life only. The mortgagee had been in possession from 1775. In 1792, the devisees of the mortgagor conveyed to other persons; and bills of revivor and supplement were filed. The annuitant being dead, an administration to her, as a necessary party, the annuity being in arrear at her death, was procured by the son and heir of the mortgagee to a person of his nomination; and upon the master's refusal, under the decree upon the supplemental bill, to allow the costs of that administration, a petition was presented by the heir of the mortgagee and allowed. The Master of the Rolls observing, that the expense was absolutely necessary, and the demand, if there was no practice against it, seemed reasonable; the original mortgagor having, by parcelling out the equity of redemption, occasioned the necessity of it. 9 Ves. 71.

Mortgagee allowed costs of administration to an annuitant under mortgagor's will, to whom arrears were due.

2d. We have seen, that if a mortgagee settles his estate on a variety of trusts, the costs of making all the persons claiming under the settlement, parties, as well *cestuis que trust* as trustees, must be borne by the mortgagee, *antea*, 402, of this edition, n. (K). The costs also of tracing the mortgagee's representative, whose concurrence is requisite in a reconveyance of the estate on a bill of redemption, must be borne by the mortgagor. *Smith v. Bicknell*, 3 Ves. & Bea. 51. n. But it has been inferred from the case of *Skipp v. Wyatt*, 1 Cox. 353, et *infra*, that the mortgagor will not be liable to pay the costs of *cestuis que trust* under the mortgagee's settlement where their claims are adverse to each other, 1 Jac. & Walk. 266, n. (a), that is, it is presumed, the costs of settling those claims.

Mortgagor must pay costs of parties, made necessary by lawful acts of mortgagee.

3d. In conveyances by expectant heirs, which have been set aside on the ground of inadequate considerations, or undue advantage, the purchasers have nevertheless been considered as mortgagees, and held entitled to costs. See *Twissleton v. Griffith*, 1 P. Wms. 310. *Gwynne v. Heaton*, 1 Bro. C. C. 1. *Spencer v. Chace*, 9 Mod. 29. *Peacock v. Evans*, 16 Ves. 512. *Gowland v. De Faria*, 17 ib. 20. and *Bowes v. Heaps*, 3 Ves. & Bea. 117. But Lord Hardwicke in one case under similar circumstances, refused to give costs (*Lawley*

Purchasers of expectant heirs allowed costs.

adverse suit, but that he should be allowed all his costs and expences, as was done in the case of a solicitor, who laid out

So of elegit creditor.

Mortgagor liable to costs, though he pay money into court.

Cost of ejectment, not allowed if no notice taken thereof, in bill.

Distinctions on costs as to lunatics and infant mortgagors.

Sale directed with consent of second and third

v. Hooper, 3 Atk. 278); and in another, gave costs against the pseudo-purchaser. *Barnardiston v. Lingood, 2 Atk. 133.*

4th. In *Owen v. Griffiths, Amb. 520*, a decree at the Rolls directing a creditor in possession under an elegit (who had been reported over-paid) to pay costs, was reversed. It does not appear, however from the report, that he ultimately obtained his costs.

5th. Where a party purchased premises, charged as a collateral security for an outstanding bond, and there being several claimants, he paid only part of the purchase-money, and executed a mortgage for the residue to the amount of such charge, and afterwards filed a bill as mortgagor against the obligees and the trustees (his vendors) to have the premises reconveyed to him, and a declaration of the court as to the parties entitled to receive the mortgage money; the court held, that it could, in effect, only be considered as a bill by a mortgagor to redeem, and that he must pay the costs, although he had paid the money into court. *Drew v. Harman and others, 5 Pri. 319. S. C. antea, 402*, of this edition, n. (K).

6th. It may be inferred from the case of *Corder v. Morgan*, cited antea, p. 19, of this edition, that where a mortgagee has absolute powers of sale, if the purchaser shall refuse to complete his contract by reason of the mortgagor not concurring in it, and a bill be filed against him by the mortgagee for specific performance, it will be decreed against him with costs.

7th. On a bill of foreclosure, the master will in general be directed to take into the account the costs incurred by the mortgagee in proceedings at law in ejectment, and such costs will be allowed. See *infra*, 1103. But if no mention be made of any actions at law in the bill or prayer, an account of the costs at law will not be ordered. Thus, on a motion under the statute 7 Geo. 2. c. 20, for a reference to the Master on a bill of foreclosure, the Vice Chancellor said, that as no mention of any actions at law, or costs incurred was made in the bill, he could not order the Master to take such costs into the account. But his Honour would allow the plaintiff to amend his bill in that respect, and permitted the motion to stand over until the bill was amended. *Millard v. Magor, 3 Madd. Rep. 433.*

8th. It has recently been decided, that the costs of the committee of a lunatic mortgagee which may be incurred in enabling him to reconvey to the mortgagor, under the statute 4 Geo. 2. c. 10, (including the costs of the reference,) are to be paid out of the lunatic's estate, whether the application be made by the mortgagor or by the committee, which latter is the most usual course. *Richards, Ex parte, 1 Jac. & Walk. 264*; see also *S. L. Bridges, Ex parte, Coop. Rep. 290*. But we have seen (antea, 207, of this edition, in *notis*.) that an infant trustee or mortgagee within the statute of Anne, will be allowed all reasonable costs incurred in executing the conveyance. The following are Lord Eldon's sentiments on this subject:—Where the costs of a trustee are directed to be taxed, that means as between party and party; not in the larger way. But, where a trustee in the fair execution of his trusts has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs but also to his charges and expences under the head of just allowances. Some of the Masters think, that as these charges cannot come under the head of costs, they cannot be given under just allowances. With regard to an infant this requires great consideration; for, as the infant himself cannot incur charges and expences, and if the costs cannot be claimed under just allowances, and the next friend is to be at the whole expence, persons will deliberate before they attend that office. *Fearn v. Young, 10 Ves. 184*. In the subsequent case of *Cant, Ex parte, ib. 554*, the same noble Lord, in ordering an infant mortgagee to convey, intimated his wish, that the Master should look into the bill with an anxiety to disallow every thing that was not necessary; for instance, a brief to counsel to consent for an infant; to which no attention could be paid.

9th. Under a bill by the first mortgagee, a sale having been directed with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, a question was made, whether the costs

and disbursed money for his client; and farther, that the profits of the estate in question should be applied, in the first place,

should be paid in the first place. The Lord Chancellor said, the costs must be paid in the first instance, for that in the case of a decree under a bill by creditors for a sale, the mortgagees were untouched by the decree, but if they came in, and consented to a sale they were bound. The first mortgagee might have foreclosed; and the third mortgagee could have prevented the effect of that by redemption only. The costs were accordingly ordered to be taxed in the first instance. *Kenebel v. Scrafton*, 13 Ves. 370.

mortgagees, costs to be paid first.

10th. The costs to which a mortgagee is entitled are not taxed costs, but such as are allowed between attorney and client; and it should appear from the case of *Ramsden v. Langley*, 2 Vern. 536, S. C. ante, p. 1037, of this edition, that if at law the mortgagee has been decreed taxed costs only, a court of equity will help him to his full costs. But

Mortgagee entitled to full, not taxed costs.

11th. Though a mortgagee is *prima facie* entitled to full costs, he may be deprived of them by his own positive misconduct. *Loftus v. Swift*, 2 Sch. & Lef. 637. It is true, that the owner coming to deliver the estate from that incumbrance he himself placed upon it, the person having the pledge is not to be put to expence with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be, and indeed will be, indemnified. But that principle does not go to a case where a mortgagee, through his improper conduct, occasions a great deal of delay and expensive litigation. If therefore a mortgagee operates the pledge with costs incurred by an unjust defence, he will be ordered to pay the same. This was in effect decided by Lord Keeper Littleton, in *Bacon v. Bacon*, (Toth. 231. 133, edit. 1820,) afterwards more explicitly by Lord Hardwicke, in *Mocatto v. Murgatroyd*, 1 P. Wms. 395, and finally by Lord Eldon, in *Detillia v. Gale*, 7 Ves. 583, in which case the latter learned Judge said it was a very clear moral proposition, that the mortgagee ought to pay all costs his unnecessary and oppressive dealings had occasioned.

But he may be deprived of them by oppression and delay.

In *Detillia v. Gale*, ubi supra, the mortgagor's solicitor had taken a mortgage from his client for the amount of his bill without any settlement of the accounts between them. An enquiry having been directed as to what was due to the defendant (the solicitor) upon his securities and otherwise, great delay and expensive litigation was occasioned by his conduct before any account could be procured from him; and, finally, his demand was reduced to more than one-sixth of the amount originally stated. The plaintiff (who was the mortgagor) pressed for a general account against him, with rests, and also for costs. For the defendant it was insisted, that there was no instance of making a mortgagee pay costs. But the Lord Chancellor said, that was not of necessity; and the principle, though generally true, did not apply to such a case as this, where the expence of the suit was not incurred by the mortgagor in attempting to deliver his estate from a demand admitted to be just; on the contrary, the great expence of the suit was incurred in a successful endeavour of the mortgagor to prove, what he had established, that the defendant charged him with a great deal more than he ought: and, the court having taken off upwards of one-sixth of his bill, there was no doubt his Lordship was acting equitably, (following the principle of the legislature,) by saying, that as to so much of the suit as related to that bill the mortgagee should pay the costs. He was under an obligation to bring into the Master's Office clear accounts capable of being clearly vouched, for he was not a mere mortgagee, but become so in consequence of his transactions as agent. Was he then to charge the estate with all the expence attending a useless and unnecessary litigation in the Master's office? Certainly not; but it was a very different consideration, whether, being a mortgagee, he was to pay the costs of the mortgagor: if any, it was to be considered, what costs; for the suit went to other accounts with other incumbrancers, and to points, as to which to a certain extent he must have had costs. Lord Eldon then stated the general principles above mentioned, and declared, that it would be a disgrace to the court to allow the defendant his costs farther down than to the time of his answer; 7 Ves. 586.

Solicitor taking mortgage from client decreed without statement to pay costs.

In a subsequent case (*Trecothick* at a. ———, 2 Ves. & Bea. 181,) it was insisted, that there was no instance of refusing a mortgagee his costs: the

Settled that mortgagee may

to pay and satisfy what was due for such costs, charges, and disbursements, before it was applied to sink the principal;

be decreed to
pay costs.

general rule which depended on a principle of public policy, with the view of encouraging loans on mortgage, requiring the mortgagor always to be ready with a tender. The Lord Chancellor, however, said, there were exceptions to this rule, as in *Detillin v. Gale*, ubi supra, where he himself had refused a mortgagee costs. In a case before Lord Thurlow (*Skuttleworth v. Lowther*, mentioned also, 7 Ves. 586), Lord Lonsdale had filed a bill of foreclosure, meaning, not that the estate should be redeemed, but to inflict a Chancery suit on the defendant, who moved for a reference to the Master to enquire what was due; having found the means of payment, the plaintiff moved to dismiss his bill. After that conduct, Lord Thurlow thought the mortgagee entitled to costs: but Lord Eldon, in the above case of *Treothick*, ats. ———, said, that he would have refused costs in such a case; as admitting the policy that had been mentioned, of holding the mortgagor to a tender, yet if the conduct of the mortgagee shewed, that though repeated tenders should be made he would not act upon them, the doctrine of law should be applied to that case. 2 Ves. & Bea. 181.

Mortgagee dis-
allowed costs
where he resists
redemption
without ground,
or pursues
wrong remedy.

If a mortgagee resists redemption merely for the sake of opposing the mortgagor, when a clear equity to redeem can be proved against him;—as if he contend, that the deed represented to be a mortgage, was an absolute conveyance, when, in fact, it is accompanied with a defeasance in a separate deed; or if he object to being redeemed on the ground of length of time, when twelve years only have elapsed since his entry into possession, especially if the person entitled to the equity of redemption labour under a disability all that time;—he will be decreed to pay the expenses which this resistance against his own knowledge may have engendered, *Baker v. Wind*, 1 Ves. 461. So, in *Broughton v. Davis*, 1 Pri. 224, the court of Exchequer gave costs for the crown against an equitable mortgagee, who stood on a point which he could not sustain. And in a late case, where a mortgagee resisted the mortgagor's right to redeem, on the ground of a decree of foreclosure, which decree the mortgagee had collusively obtained, he was decreed to pay so much of the costs as were incurred by his contrverting the right to redeem, and for all the evidence rendered necessary by that resistance. Beyond that, however, the court said, he was not bound to pay; and it was decreed that he should receive his costs as to so much of the suit as was necessary for the redemption, *Harvey v. Tebbat*, 1 Jac. & Walk. 202. S. C. antea, 979, note (Q). Where a mortgagee filed a bill against the mortgagor, to make him account as bailiff, and, upon an issue at law, it was found that the plaintiff was a mortgagee; upon which he amended his bill, or rather converted it into a bill of foreclosure; he was decreed forthwith to pay the costs of the issue, the costs of the present application, and all other costs which the defendant had sustained beyond what he would have been put to if the bill had been originally a bill of foreclosure. *Smith v. Smith*, Coop. Ch. Ca. 141. Belt's Supp. 1 Ves. sen. 88. The question as to what costs a mortgagee shall receive who has created the necessity of a suit, arose also in *Quarrel v. Beckford*, 1 Madd. Rep. 286; but the case went off on another ground.

Sed contra if
case be doubt-
ful, or issue
directed.

It should, however, be remembered, that if a mortgagee insist upon a point which is doubtful, it will not deprive him of his costs, *Perry v. Barker*, 13 Ves. 405; for costs do not follow the event of the suit, where a fair question is raised, *Staines v. Morris*, 1 Ves. & Bea. 8. And if his objection be of sufficient weight to induce the court to direct an issue, it will not be vindictive and vexatious, though it be expensive, and he will be allowed his costs; as where, on a bill to redeem, the mortgagee insisted that the heir at law of the mortgagor, who was represented to be deceased, was one W. B., and that he was not proved to be dead; whereupon it was referred to a Master to ascertain the fact, and he reported that W. B. was dead, and he continued of the same opinion after reviewing his report; after which an issue was directed, and tried at the York Assizes, and the jury found that W. B. was dead; it was held by the Vice Chancellor that the mortgagee was not liable to pay the costs of the issue, nor could he be charged with vexation, when the court thought there was so much weight in his objection as to direct an issue. The exception was consequently over-ruled, but without costs. *Wilson v. Metcalf*, 3 Madd. Rep. 46.

for that it was not reasonable he should wait for it, and be allowed it only on the foot of the account (as had been usually

In the above case of *Detillin v. Gale*, Lord Eldon enquired whether a mortgagee could be compelled to pay the costs on the other side, as well as his own. An affirmative answer appears to have been given to this question in *Taylor v. Baker*, 1 Dan. Rep. 82. S. C. 5 Pri. 311. antea, p. 574, of this edition, n. (P). In that case it will be recollected, that a purchaser of the equity of redemption, having constructive notice of a mesne incumbrance at the time of his purchase, afterwards procured the legal estate from the first mortgagee for the purpose of defeating the security of the mesne incumbrancer, and strengthening his own title. But it was held, that the purchaser stood in the place of the first mortgagee, and, as such, was redeemable by the second incumbrancer, who had an equitable mortgage. In making this decree, the court directed the first mortgagee and purchaser to pay the costs of the second mortgagee, for that he acted in an extremely dishonest way; knowing of the plaintiff's incumbrance, he dealt with the mortgagor behind his back; he said, "I know the plaintiff has this charge, but will oust him of his right." The court would not allow such a mortgagee to have his costs, especially as they were not costs imposed by any contract between the parties. 1 Dan. Rep. 82. This case Sir T. Plumer, M. R. said, afforded clear authority, that if the conduct of the mortgagee required it, he will not only be precluded from receiving his own costs, but will be made to pay those of the other party. In *Skipp v. Wyatt*, 1 Cox, 353, the plaintiff was devisee of a mortgagee, who devised to him the mortgaged premises, and the money due thereon. The bill was against the heir and executor of the mortgagor for a foreclosure, and the heir of the mortgagee was also made a defendant to have the will established against him. His Honour directed an account of the plaintiff's principal, interest, and costs; but as to the costs of the heir of the mortgagee, the Master of the Rolls thought the estate ought not to be burthened with them; the heir being made a party by reason of the act of the mortgagee in the disposition of his property; and the plaintiff must therefore pay the heir his costs, and he will not be entitled to have them over from the estate. In the previous case of *Berrisford v. Millward*, (Barnard. C. C. 102. S. C. antea, p. 438, of this edition, in the text,) where the mortgagee had voluntarily concealed his mortgage for the purpose of advancing the mortgagor's son in marriage, he was postponed to the issue of the marriage, who took under a settlement made on that occasion; and an injunction to stay the mortgagee's proceedings at law was made perpetual, and he was likewise ordered to pay the costs both in law and equity, and the costs of an assignment also, which was directed to be made by him to the trustees of the settlement. See 3 Atk. 49. In *Moroney v. O'Dea*, a defendant by his fraudulent conduct, though considered as a mortgagee in possession, was also deprived of his costs; Lord Manners observing, that the agreement in 1797, was, on the face of it, a fraud; which, in his mind, was quite sufficient to deprive the defendant, as mortgagee, of his costs. 1 Ball & Bea. 121.

It is further observable, that if a mortgagor, on a bill to redeem, suffer a decree to pass, whereby the matter is referred to a Master to take an account of what is due for principal and interest in the usual manner, including costs, it will be too late for him to object afterwards to the mortgagee's receiving his costs, on the ground that the suit was rendered necessary by his unconscionable conduct, though the report may have found the mortgagee to have been overpaid in the teeth of a declaration that a considerable sum was, at the time of filing the bill, due to him. *Gilbert v. Golding*, 2 Anstr. 442.

Where the Master's report, under a decree on a bill of foreclosure by the widow and devisee of a mortgagee against a purchaser from the mortgagor, stated, that the mortgage-deed was not to be found, the Master of the Rolls said, there ought to be a reconveyance certainly; and the plaintiff (the mortgagee) ought to pay the costs, the suit being occasioned by the loss of the deed: as to an indemnity against an assignment of the mortgage, the risk was very slight, but some security was necessary to be taken; upon which it was arranged, that the form of the security should be settled by agreement. 19 Ves. 386. S. C. 3 Ves. & Bea. 51. This case may be con-

Mortgagee made to pay costs.

Too late for mortgagor to object, after decree to account.

Mortgage deed lost, reconveyance directed, with indemnity and costs.

done) whereby he might lose the interest thereof, for ten or more years together.

[1069]

Decree of foreclosure impeachable for fraud, though signed and enrolled.

And a decree to foreclose, though made absolute, signed and enrolled, is no plea to a suit to redeem, if surreptitiously procured (i). Thus, where a plaintiff brought a bill to redeem, setting forth, that his late father being seised in fee of lands in P. of 50*l. per annum*, made a mortgage thereof to I. S., and that the defendant desired the plaintiff's father would consent that this mortgage should be assigned to the defendant, who would help the plaintiff's father to a place, and be willing to take his interest out of the profits of the place; that thereupon this mortgage was, by the plaintiff's father's consent, assigned to

(i) *Lloyd v. Mansell*, 2 P. Wms. 74. [See two cases of fraud, *antea*, 976 and 978, of this edition, n. (Q).—*Ed.*]

sidered as over-ruling that of *Langford v. County of Salop*, Toth. 229, where it was held, that the mortgagee might keep the mortgage-deed after payment of the money. It may here be noticed, that where a vendor had lost the title-deeds of his estate, the purchaser was held entitled to an adequate real security. *Walker v. Barnes*, 3 Madd. 247. et vide *antea*, 934, of this edition, n. (R).

Mortgagee selling under general order in bankruptcy, must pay expenses of sale.

Finally, it is observable, that in *Bowles v. Perring*, 2 Brod. & Bing. 457, where the mortgagee applied to the commissioners of a bankrupt mortgagor, at a general meeting for a sale of the mortgaged premises under Lord Loughborough's order, 8th March, 1794, and the sale was directed accordingly; at which sale the mortgagee became the purchaser, the court of Common Pleas was clearly of opinion, that the mortgagee was bound to pay the expenses of the sale, including advertisements and the solicitor's charges under the commission, he having attended the sale, prepared the conveyance, and procured its execution. Burrough, J. observing, that the sale was for the benefit of the defendant [the mortgagee] as it enabled him, if the estate turned out to be insufficient to pay the mortgage-money, to prove the difference under the commission; that this mode of proceeding was more expeditious and beneficial than foreclosure, and that, at all events, the defendant, having adopted it, was bound to take it with all its incidents. It was then insisted, that the defendant was not liable to pay the fees of the commissioners, amounting to 20*l.* As it did not appear that the meeting was held at the defendant's request, or for his business especially, Park and Burrough, Justices, (who said they had been commissioners of bankrupt for many years,) declared they entertained no doubt that the defendant was, under the finding of the jury, (which precluded the court from entering into the quantum,) liable to reimburse the plaintiff these charges also, as every meeting of the commissioners, in which the accounts of an individual are examined for his own benefit, constituted a special meeting as to that individual, although other business might be transacted the same day. But Dallas, C. J. and Richardson, J. expressing a wish that the fact should be ascertained, whether the meeting in question was or was not at the express instance of the defendant, and for his special business; the plaintiff, in order to end the cause, consented to abandon any charge for fees to the commissioners beyond what they would have been entitled to on a general meeting, and a verdict was entered accordingly. 2 Brod. & Bing. 460.

The subject of this note has been previously hinted at in various pages. See *antea*, 187. 336. 977. 993 of this edition, and *antea*, 1037, where a mortgagee was denied the costs which a mortgagor occasioned by a cross bill in the cause. As to costs on equitable mortgages and in bankruptcy, see ch. xxiii. *postea*, and *Pilkington v. Wignall*, 3 Mad. Rep. 240, where A. filed a bill of redemption without title, and then purchased a right to redeem, but his bill was dismissed with full costs. *S. P. Tenkin v. Leithbridge*, Coop. 43.

the defendant, who never helped the plaintiff's father to any place; but instead thereof, the defendant, the next term after the mortgage was forfeited, brought an ejectment against the plaintiff's father, and turned him out of possession; and the term next following, the defendant brought a bill against the plaintiff's father, who put in an answer to the bill, and then the defendant got a common bailiff, one of a scandalous character, to make an affidavit, that the plaintiff's father had left his habitation, and (as he believed and was credibly informed) was gone beyond sea; upon which affidavit the now defendant got an order, that service of the then defendant's clerk in court might be good service; whereas the plaintiff's father was then living, and publicly appeared in the next county with his wife's relations; but upon this false affidavit, and order made thereupon, the cause was heard *ex parte*, and the report made *ex parte*, and confirmed absolutely; by which means the plaintiff's father became absolutely foreclosed, although the estate was of much greater value than the mortgage. [1070]

The defendant pleaded this decree and report (k), and both made absolute, signed and inrolled. *Et per curiam*, all these circumstances of fraud ought to be answered; which the defendant has been so far from doing, that he only pleads that decree and report as a bar, which the plaintiff seeks to set aside; and the decree being signed and inrolled, the plaintiff has no other remedy; and if these matters of fraud laid in the bill are true, it is most reasonable that the decree should be set aside, and the plea was over-ruled.

It was objected, in the above case, that according to the rule then laid down, a decree might be set aside by an original bill (m); but the court replied, that such a gross fraud as this, was an abuse of the court, and sufficient to set any decree aside. [1071]

The time for payment, limited on a decree for foreclosure, may be renewed several times, upon special circumstances. Thus, where a decree for foreclosure was made, and six months time given thereby for redeeming, according to the usual form of those decrees (n); the six months being near expiring, the

Decree of foreclosure was enlarged three times (x).

(k) *Lloyd v. Mansell*, 2 P. Wms. 74.

(m) *Ibid.*

(n) *Anon.* Barn. Rep. 221. S. C. 2 Eq. Ca. Abr. 605, pl. 37. [For the

effect of extending time for redemption, on interest, see *antea*, 913, of this edition.—Ed.]

(E) So if the mortgagee, on a bill of foreclosure, refuse to produce the title-deeds, it seems that this also will be a good reason for enlarging the time. *Cases on a bill of foreclosure.*

[1072]

mortgagor obtained an order for enlarging the same for six months more. After this, he produced another order for enlarging the time six months farther, but it was made part of that order, that he should sign the Register's book, and thereby agree not to ask for a farther enlargement. He signed the Register's book for that purpose accordingly. Notwithstanding which on a farther motion, that the time might be enlarged six months more upon this circumstance, that the estate was of greater value than the incumbrance upon it amounted to, the Lord Chancellor was of opinion, that, upon that ground, the motion was reasonable; but made it part of his order, that this last time should be peremptory (F).

time of redemption. *Anon.* Mose. 246. et vide *Stokoe v. Robson*, 3 Ves. & Bea. 51. S. C. 19 Ves. 385, et antea, p. 959, of this edition, n. (U), where a motion was made for further time to redeem a mortgage, and that it should stand as a security for what was *bonâ fide* advanced, but forfeited as to what was won at play. Lord Hardwicke said, as the mortgagor, in a former cause where he might have done it, did not insist on a redemption, the foreclosure could not be regularly kept open, but on the whole circumstances, his Lordship allowed three months further for redemption. *Fleetwood v. Janseen*, 2 Atk. 466. For the modern cases on this head, see the next note; and that securities for money won at play are void, see *Low v. Waller*, 2 Doug. 743. 9 Ann. c. 14. ss. infra.

Fourth order
for enlarging
time granted,
though preced-
ing order was
peremptory.

(F) In a late case a fourth order was made for the enlargement of time to redeem on a decree nisi, notwithstanding the preceding order was peremptory. The mortgagor's solicitor made an affidavit that the estate had been sold, but owing to some objections to the title, the contracts were not executed, but that the objections were satisfactorily answered, and that he verily believed he should be able to get such sales completed within the space of three months. The Vice Chancellor remarked, that it required a strong case to induce the court to make a fourth order enlarging the time for the payment of mortgage money decreed to be paid. If the defendant had done all he could to obtain the money, and had been baffled in his purpose by unexpected delays, and there appeared a strong probability of the money being raisable within three months, the court would feel disposed to enlarge the time. It was sworn that the objections to the title were satisfactorily answered, and the solicitor also swore, that he verily believed the sales would be completed within three months. The last order did certainly purport to be a peremptory order. But his Honour thought, the court had sometimes in these cases given further time, notwithstanding that expression; whereupon an order for three months further time, on the usual terms, was granted. *Edwards v. Cunliffe*, 1 Madd. Rep. 289. The mortgage-money, in this case, was 7000*l.*, and the estate was calculated to be worth 15,000*l.* It was afterwards sold by auction, between the dates of the second and third orders, for 9000*l.*—So it was said in *Jessop v. King*, 2 Brod. & B. 97, that the slightest ground will induce a court of equity to extend the time of sale in a foreclosure cause.

Time may be
enlarged under
7 Geo. 2.

Where an order has been made under the 7th Geo. 2. c. 20. s. 2., a further order may be made to enlarge the time to redeem; for the latter words of the act put it exactly in the same situation as if the cause had been brought to a hearing; and notwithstanding Mr. Cooper's objection, that the court had no authority under the statute to enlarge the time, the object of the statute being to relieve mortgagors, who had their money ready, from the necessity of submitting to the delay and expence of a suit; yet the Lord Chancellor thought that one of the intents and purposes of the statute must be to give the court this jurisdiction, and refused the time prayed, which was eight months and upwards, but ordered the time to be enlarged to the first day of the ensuing Hilary Term, a period of about six months. *Huckerell v. Delight*, 9 Ves. 36. S. C. antea, 170, of this edition, n. (T).

And where it appeared that, notwithstanding a continued endeavour on the part of the mortgagor, to sell the lands mortgaged, and pay what was due, he was prevented by inevitable necessity, and no wilful default could be alleged in him, as where a rebellion was subsisting (o); the court enlarged the time as to the performance of such a decree, *notwithstanding it has been signed and inrolled*.

Under pressing circumstances time enlarged, though decree signed and inrolled.

A decree for foreclosure will not be opened in favour of a mere volunteer (p); for a mortgagee is a purchaser, and so hath equal equity with a volunteer, and an absolute estate, in law, by the foreclosure.

Foreclosure never opened for volunteer.

It has been observed, that in Welsh mortgages, where, by special agreement, profits are to be set against interest, there can be no foreclosure: but on tendering principal and interest the mortgagor may come into Chancery for a redemption at any

No foreclosure on Welsh mortgage.

[1073]

(o) 1 Ch. Ca. 63, 4. *Cocker v. Beavill*, 1 Ch. Rep. 253. *Ismoord v. Claypool*, 1 Ch. Rep. 139.

(p) *Roscarrick v. Barton*, *supra*. S. C. 1 Eq. Ca. Abr. 317, pl. 4.

If a mortgagor dispute the right of the mortgagee to the money, but the mortgagee nevertheless obtains a decree of foreclosure, the court will not upon motion, suspend the execution of the decree until six months after an appeal shall be heard, but will allow the mortgagor six months from the time fixed by the Master's report, upon his consenting to the appointment of a receiver, and paying the plaintiff the interest due from the time of filing the bill, and the costs, upon his undertaking to repay if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

Second order made conditionally.

The origin of this doctrine, allowing an enlargement of the time, is to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time. The court of Chancery proceeded on this erroneous notion, that by the payment of interest, the party was put in just the same state as if the principal had been paid at the time stipulated; but the failure of payment at the time may be attended with mischievous consequences that never can be cured, in a rational sense, by a subsequent payment with the addition of interest, per Lord Eldon in *Reynolds v. Pitt*, 19 Ves. 140. The same noble Lord has regretted that the court ever varied the agreements of the parties in these cases. *Anon.* MS. 2 Madd. Ch. 492. During the Usurpation, it was recommended that a limit should be given for mortgagors to redeem, but this recommendation has never been adopted. See 20 Parl. Hist. 206. In Ireland and Scotland this rule is different, or rather does not exist; for the courts in these countries never interfere in the manner in which courts of equity do in England, to protect the borrower against the immediate payment of money vested in land. On this account, money is, in those countries, more frequently lent on mortgage than in England. 2 Madd. Ch. 492, n.

Origin of rule; which prevails only in England; and its adoption regretted.

But it is essential to add, that the time will not be enlarged on a bill of redemption as on a bill of foreclosure. *Novosielaki v. Wakefield*, 17 Ves. 417. The natural decree on a bill of redemption is, that the second mortgagee shall redeem the first, and that the mortgagor shall redeem him or stand foreclosed, per Lord Thurlow in *Fell v. Brown*, 3 Bro. C. C. 278, approved by Sir Wm. Grant, M. R. in *Palk v. Clinton*, 12 Ves. 59, and acted on in *Sutherland v. Northmore*, 1 Dick. 58, and in *Aynsley v. Reed*, lb. 251. It is now settled, that if a bill filed by a mortgagor for redemption, be dismissed, the money not being paid at the time, that will operate as, and be equivalent to, a decree of foreclosure. *Winchester v. Paine*, 11 Ves. 199. See as to this, *antea*, 968, of this edition, n. (K).

Time not enlarged on bill to redeem, as on bill to foreclose.

time (q). The reason is, because, in such cases, there is nothing for the rule laid down by the court in analogy to the statute of limitations, to operate upon, for there is no forfeiture, and it is on forfeiture that the rule begins to attach. And though, in such case, the mortgagee becomes in the nature of a perpetual bailiff to the mortgagor, which is an additional objection to opening long accounts, yet that does not hold, where the mortgagee voluntarily takes the estate subject to a perpetual account, because he ought not to be relieved from his own contract and agreement.

First mortgagee forecloses second, then devises to mortgagor. Second mortgagee may as against mortgagor, open foreclosure and redeem.

[1074]

A foreclosure, obtained by a first mortgagee against a second mortgagee, will be opened in favour of such second mortgagee, if the land be afterwards devised by the *first* mortgagee to the *mortgagor*; for although the second mortgagee, having accepted the lands already mortgaged for his security, must hold them, subject to the same conditions, to which they are liable in the hands of the mortgagor (he being able to convey only what he has, which is an estate subject to foreclosure, unless redeemed either by him, or those claiming under him); yet, as between the mortgagor and mortgagee, the debt continuing due, and the charge on the estate valid, it is capable of re-attaching upon the lands, if they come again into the hands of the mortgagor, or those of a subsequent claimant under him; and the mortgage deed may be made use of, as a kind of equitable estoppel, to any plea the mortgagor may put in, in answer to this claim.*

Lessor estopped from disputing lease.

[1075]

It in some degree resembles the case, where a man makes a lease, by indenture, of D., in which he has no interest, and then purchases D. in fee, and afterwards bargains and sells it to A. and his heirs (r); in which case, A. will take subject to the lease (s). So, where a trust is broken, and then something done which is a full bar to the *cestui que trust*; yet the land coming afterwards to the trustee's hands, he will be decreed to convey to the *cestui que trust*. Thus, where there was a first and second mortgage made of the same estate, the first mortgagee brought a bill against the second, to compel him to redeem or to be foreclosed, and foreclosed him accordingly (t); afterwards, the first mortgagee, by his will, devised the same premises to the mortgagor; whereupon the second mortgagee brought a new bill, to set aside the first mortgage, and to be let into a satisfaction of his money; to which the defendant pleaded the former suit, and decree of

(q) 1 Ves. 406. *Howell v. Price*, supra, [373 and 374, of this edition. —Ed.]

(r) Salk. 276.

(s) *Lord Canmore's case*, cited 1 Vern. 148.

(t) *Cook v. Sadler*, 2 Vern. 235. S.C. 1 Eq. Ca. Abr. 317, pl. 2.—Ed.]

foreclosure: but the court ordered the defendant to answer the bill.

A mortgagee may, after a foreclosure, proceed on his bond or other collateral securities. Thus, where E. made a mortgage of some leasehold estates to R. for 1200*l.* and afterwards sold the premises to W. for 1500*l.* W. paid off parts of the mortgage-money at different periods, and died (u). His nephew afterwards paid off a farther sum. Then R. filed his bill against the representatives of W., to foreclose the equity of redemption, and obtained a decree for that purpose, which became absolute. Then R. got into possession. The value of the premises not being equal to the mortgage-money, R.'s executors put up the estate to sale by public auction, but no sum being bid equal, in their opinion, to the value, the estates were bought in by a trustee for them, at 400*l.* Notice of the day and time of sale had been sent to D., who was the executor of E. Then the executors of R. brought an action against the executors of E., on the bond for the remainder of the mortgage-money, unsatisfied by the sale of the estate, and obtained a judgment at law. Then the executors of E. filed a bill, praying an injunction, and that the bond might be delivered up to be cancelled; insisting that the mortgagee having foreclosed the equity of redemption, and taken the pledge, had made his election, and relinquished his right to a personal remedy. But it was answered, that the executors of the mortgagee were certainly entitled to proceed upon the bond for what the pledge proved deficient to pay. And the Chaucellor was of opinion with those who supported the action, that they had a right to proceed at law (H).

Mortgagee may foreclose and proceed on bond, or collateral security for deficiency (G).

[1076]

(u) *Tooke v. Hartley*, 2 Bro. C. C. 8 Ves. 531, et infra, p. 1003, of this edition, in *notis.*—*Ed.* [S. C. 2 Dick. 785, and cited

(G) See S. L. antea, 204, of this edition, and postea, 1004, of this edition; and if the mortgagee have no collateral security, it is presumed that an action of *indebitatus assumpsit* would lie for any deficiency after foreclosure. See also antea, p. 775, of this edition, n. (B).

(H) Lord Thurlow's judgment in this case, as reported by Mr. Dickens, was as follows:—His Lordship was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage-deed, was entitled to be paid what was due on the mortgage; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due; and to the extent of what it did not, the mortgagee had a right, and so it was then established, to bring an action against the mortgagor, to recover the deficiency; and therefore his Lordship disallowed the cause, and dissolved the injunction. *Tooke v. Hartley*, 2 Dick. 785.

Mortgagee cannot sue on bond after foreclosure till he has sold estate.

From Lord Colchester's MSS. it appears that Mr. Mansfield, of counsel for the plaintiff, strongly insisted in the above case that the defendant ought to be restrained; for that, if he had kept the estate

Third report of Tooke v. Hartley.

Notice of sale after foreclosure, should be given to mortgagor.

[1077]

Mortgagee suing on bond, or collateral security after foreclosure, revives redemption (1).

But in such case [that is, where a mortgagee has procured an absolute decree of foreclosure by fair means, and afterwards offers the estate to sale by auction,] it is prudent to give the mortgagor notice of the day and time of sale, so that he may prevent it if he please, by redeeming; and that mode of proceeding will be an answer to any objection, or the foundation of fraud in transacting the sale (v).

But if the mortgagee, after having obtained a decree to foreclose, take out process upon any counter-security, with intent to recover his mortgage-money, this amounts to a waiver (x). As if a mortgagee, after having got a decree to foreclose, which

(v) [This paragraph is remarked on in the succeeding note.—Ed.]

(x) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317, pl. 3.

after the foreclosure, upon suing the bond at law, the foreclosure, by the rules of equity, would have been opened, and the mortgagor, on paying the debt, might have had his estate again;—that, as he was precluded from this by the sale of the estate by the mortgagee, the debt must in equity be considered as satisfied and gone;—that it might open a door to collusion in the sale of mortgaged estates, and would be very oppressive upon the borrower. But the Lord Chancellor held, that the mortgagee, after foreclosure absolute, had a right to sell the estate and sue on his bond too, and that there was no reason the lender should lose part of his debt, and be prevented from enforcing the additional security he had taken; and refused to continue the injunction. Nevertheless, his Lordship offered to continue the injunction to a hearing, being a new point in species, if the plaintiffs would bring the money into court; but the plaintiff not being able to do that, he refused the injunction. 2 Bro. C. C. 125, Mr. Belt's edition, n. (1.) For further observations on this decision, see the next note.

Mortgagee may sue on bond after foreclosure.

In a previous case of *Aylett v. Hill*, 2 Dick. 551, the same noble Lord held, that a mortgagee might proceed at law on his bond, notwithstanding he had obtained a decree of foreclosure. But the Reporter adds, "*Quære*, whether having obtained possession of the pledge, he could do it till the pledge has been *bonâ fide* sold, and it is seen whether it is deficient to answer the whole of the debt?" An answer to this question is attempted to be given in the succeeding note, towards the latter end.

Mortgagee restrained from proceeding on bond, after foreclosure, under circumstances.

(1) The latest case on this head is that of *Perry v. Barker*, 8 Ves. 527, and 13 Ves. 198. where under the circumstances a mortgagee was enjoined from proceeding at law on his bond, after he had obtained an absolute decree of foreclosure, and had sold the mortgaged premises. This case deserves to be particularly stated. The facts were shortly these:—The defendant (a mortgagee of a term of 500 years to secure the sum of 800*l.* and interest, with the usual covenants, and a joint and several bond) in Hilary Term, 1797, filed a bill of foreclosure; and in February, 1798, the usual decree was made. The Master's report ascertained the sum of 909*l.* to be due to the mortgagee, who in July following took possession of the estate; and in November, 1798, the decree of foreclosure was made absolute. In February, 1799, the mortgagee sold the premises by auction for 800*l.* and afterwards brought an action on the bond for 135*l.* with interest from the 28th of June, 1799, the period of completing the said sale. The bill was filed by the mortgagor in 1803, praying a redemption, and an injunction; or, that the defendant might be decreed to have elected to take the premises in satisfaction of his demand, and might in that case be decreed to deliver up the bond, and be for ever restrained from proceeding against the plaintiff. The question was, whether a mortgagee having obtained an absolute foreclosure, by which the estate was become his property, could afterwards sue on a collateral security upon the principle that there was still a subsisting loan. Lord Eldon on the first hearing of the

is signed and inrolled, bring an action of debt on the bond given at the same time, for payment of the money and performance of

cause observed, that no case had been produced, previous to 1786, in which, after a foreclosure, the mortgagee had proceeded to sale, and afterwards brought an action for the money. That circumstance had some weight. Mr. Maddocks (of counsel for the defendant in *Tooke v. Hartley*), who knew the practice of the court well, felt great difficulty in contending broadly, that the mortgagee might sell the estate after foreclosure, and then proceed upon the bond; and was driven to the admission, that the foreclosure was opened under those circumstances; at the same time stating, not very consistently that the action might be for the remainder. The action in that case must have been for the whole money; for it was an action on the bond. But consider, added his Lordship, how it would be if the action had been on the covenant; laying the damages for the remainder of the money. It is not very consistent to say, you open the foreclosure, desiring the mortgagor to bring in only the remainder of the money; for the consequence of opening the foreclosure would be, that a new account should be taken of the principal and interest; and the money to be brought in upon that footing should be all that was due, or nothing. The case of *Tooke v. Hartley*, certainly did not decide this; for the estate, in fact, sold or not, was in the possession of the mortgagee; and if placed in the same situation as if there had been no foreclosure, the estate being in his possession, what was required by justice as to the re-conveyance, might be done by the court. But, where it was sold to a stranger, the power of re-conveyance was gone, and the mortgagor could not have any right [to the estate in that case even if the redemption were] to be considered as re-opened. At the same time Lord Eldon certainly understood Lord Thurlow's opinion to have been, that, whether the estate was sold to a stranger, or remained in the possession of the mortgagee, there was no distinction; but an action might be brought for the difference. That opinion of Lord Thurlow, and the circumstance, that this particular case was never decided made it proper for Lord Eldon then to grant the injunction, extending it to stay trial, which he did accordingly, the plaintiff paying the money into court in the mean time. 8 Ves. 531.

Consequence of opening foreclosure.

After foreclosure mortgagee may sue on bond whether he has sold estate or not. Semb.

Injunction in Perry v. Barker made perpetual.

Three years after the granting of this injunction, the cause again came on before Lord Chan. Erskine, who said, that he should consider Lord Thurlow's opinion to have been what Lord Eldon in a former stage of the proceedings had stated it to be, but Lord Erskine then inclined to a middle course, that though, when a mortgagee has obtained a decree of foreclosure, the estate is his, yet if he will bring an action, he shall give the mortgagor an opportunity to redeem; and the true equity and justice of the case seemed to be, that the foreclosure was opened by the action; but then there must be some mode of bringing forward the mortgagor; giving him notice that he might redeem; or the mortgagee previously acknowledging that he was a trustee. On a future day Lord Erskine declared himself to continue of the opinion he had already expressed, which was confirmed by a communication with Lord Redesdale. And as he (Lord Erskine) thought the foreclosure was opened, and as the sale was so long ago as 1799 [7 years], and the defendant's demand was so inconsiderable [135*l.*], it was scarcely possible that the mortgagee should seek to put himself in circumstances, that would allow the mortgagor to redeem; the consequence of which would be, that the mortgagee must account for the rents and profits, as if no sale had taken place, and as if he had continued in possession. Under these circumstances Lord Erskine conceived the best decree would be, to make the injunction perpetual. He ought not however to do that without observing, that he was not sure, whether the embarrassment upon this subject had not arisen from this, that the court in one respect did not act altogether up to its own principle in the case of a mortgage. The mortgagee took a double security: the personal covenant of the mortgagor, and usually a bond also, and a pledge of the estate. If, before he filed a bill of foreclosure, he sued upon the bond, or brought an ejectment, the court would not stop any of his remedies. But if he filed a bill of foreclosure, and the mortgagor was unable to procure the money, the estate, whatever might be the value, was gone. Was it not then extraordinary that he should have the advantage both ways; that, foreclosing,

the covenants in the mortgage-deed ; such action will open the foreclosure, and let in the equity of redemption of the mort-

Course in Ireland is decree for sale, instead of foreclosure.

he should keep the estate, though of much greater value, but if it was a scanty security, he should recover the difference? What Lord Erskine meant by presuming to say, the court had not acted up to its principle, was this, that perhaps, instead of a foreclosure, a decree for sale of the estate would be more analogous to the relative situation of lender and borrower, and his Lordship had been informed by Lord Redesdale, that such was the course in Ireland ; a decree for sale instead of a foreclosure ; and if the sale produced more than the debt, the surplus went to the mortgagor ; if less, the mortgagee had his remedy for the difference. [See an Irish decree of foreclosure, 1 Dow. P. R. 20, where the equity of redemption was decreed to be foreclosed, the estate sold by an officer of the court, the mortgagee paid his principal, interest, and costs, and the remainder returned to the mortgagor.] Lord Erskine further observed, that if in the instance before him, there was any probability that the mortgagee could get the estate back again, he ought to have a time limited for that purpose, then he ought to tender a conveyance, and the mortgagor should have a given time to redeem ; but under the circumstances of this case, the mortgagee's demand being so inconsiderable, the proper decree was an injunction, and his Lordship would not give costs, as there had been a doubt upon the subject. 13 Ves. 205.

Lord Erskine's decision in Perry v. Barker reviewed.

The whole of this decree proceeds upon a very unsatisfactory principle, 1st, A vein of doubt and indecision pervades the whole judgment ; 2d, It may be asked by what measure the mortgagee is to consider the difference for which he sues, inconsiderable,—if by the sum lent, then one-eighth of his debt after a lapse of seven years, would be too small a claim to excite the attention of a court of equity ; so that if his mortgage were for thousands instead of hundreds, he must be content to lose 1350*l.* as an inconsiderable sum ;—if by the actual value of money in dispute, it is presumed that by far the greater portion of suitors in the Court of Chancery would not conceive the sum of 135*l.* to be a trifling demand. But, 3d, Lord Erskine appears to have been of opinion, that when a mortgagee has foreclosed and sold the estate, he cannot proceed on his bond for the deficiency, because if he does so proceed, he re-opens the redemption, and no redemption can be effected, inasmuch as the mortgagee having parted with the estate, cannot re-convey it to the mortgagor on receipt of his principal, interest and costs ; which is at variance with all the authorities on this subject, and may freely be pronounced to be bad law. That a mortgagee may sue on a collateral security after foreclosure and sale, appears never to have been doubted, and is fully established by the cases mentioned in the preceding note. His Lordship was also of opinion, that if after a foreclosure and sale there is any probability that the mortgagee can get the estate back again, he should then have a limited time for that purpose, at the end of which period he should be at liberty to proceed on his bond, provided he could then tender a conveyance. This is very vague doctrine, and such as would impose on the mortgagee incalculable difficulty, and after all be productive of very little advantage ; for a purchaser would not willingly reconvey without an advance of price, which must devolve solely on the mortgagee, and which it cannot be expected he would voluntarily tender for the sake of a troublesome, and perhaps litigious, mortgagor.

Whether mortgagee can sue on bond after foreclosure, and before sale.

It should be observed, that Mr. Dickens's report of *Tooke v. Hartley*, as cited in the preceding note, was not published until after Lord Eldon had stated what he conceived Lord Thurlow's opinion in that case to have been. Mr. Belt on this, remarks, " Lord Thurlow's clear opinion was, that an action might be brought for the difference, if the mortgaged estate were sold out and out fairly, without collusion, and for the best price, and not as (through some mistake) stated in *Perry v. Barker*, 8 Ves. 531, if the estate still remained in the possession of the mortgagee." See 2 Bro. C. C. 125, n. (1), Belt's edition. If Mr. Dickens's report can be relied on, there is certainly a very material error in Lord Eldon's expression of Lord Thurlow's opinion. But it should be remembered that Lord Colchester's MS. note of *Tooke v. Hartley*, which Mr. Belt supposes to have been taken by the present Lord Chief Baron when at the bar (see 2 Bro. C. C. 125, Belt's n. (1)) omits all notice of this very important distinction, and that the late

gagor. For though the court will, in its discretion, after a reasonable time, allow the mortgagee to take the benefit of the

Sir S. Romilly in his note of the same case (cited 8 Ves. 528), alludes to no observation whence it may be inferred that Lord Thurlow was of the opinion imputed to him by Mr. Dickens. Without insinuating that the report of the latter gentleman is a prejudiced report (to which his *quære* on *Aylett v. Hill* in the preceding note (H) may be thought to give some countenance) it becomes an object of pressing consideration to inquire, whether this half-adopted dictum of Lord Eldon's,—that a mortgagee may, after foreclosure and before sale, sue on his bond for what he conceives to be still due to him,—can be supported on principle, in opposition to Mr. Dickens's report of Lord Thurlow's judgment, as also in opposition to Lord Erskine's observations in the above case of *Perry v. Barker*, that if the mortgagee were in such case allowed to proceed, a palpable injustice would be the result by giving him a double advantage?

It is admitted that the equity of the court can be more substantially administered where the foreclosure is opened during the continuance of the mortgagee's possession than when he has parted with the estate; because if the mortgagor redeems, the pledge can be returned him in the same manner as if no foreclosure had taken place; but a question presents itself, where the premises have not been sold, how the mortgagee is to say that any difference is due to him, until he has ascertained the real value of the estate by actual sale? The solution of this question is quite beside the argument; for supposing a mortgagee to foreclose, and (still retaining possession of the estate) to bring an action on the bond for the whole money, or on the covenant for a supposed deficiency, the equity of redemption would be revived, and the mortgagor allowed time to redeem if he conceived himself hardly dealt with, and that time would be enlarged again and again, in order to give him an opportunity of finding a purchaser, but if no person can be found who will accede to the mortgagor's price within a reasonable time, the presumption is, that the mortgagee has set the real, and the mortgagor the fictitious, value on the property pledged. A second foreclosure would then be decreed, and the mortgagee allowed to proceed at law on his bond or covenant, if he had not already done so, for the deficiency, which would neither be giving him an undue advantage, nor be productive of any injustice to the mortgagor. It is also observable, that in Lord Colchester's note of *Tooke v. Hartley*, the point seems incidentally determined, or rather admitted by both judge and counsel. Mr. Mansfield insisted, that notwithstanding the mortgagee might have kept the estate after foreclosure, yet might he have sued on the bond, the consequence however of such suit he admitted would be, the revival of the equity of redemption; and Lord Thurlow (apparently acquiescing in that doctrine, but carrying it still further) said the mortgagee after foreclosure had a right to sell the estate and sue on his bond too. It appears that the mortgagee in *Tooke v. Hartley*, had actually sold the estate, Lord Thurlow was not therefore called on to decide (as Mr. Dickens states him to have done) that so long as the mortgagee kept the estate he could not sue on his bond. It is lastly observable, that if it be law, that a mortgagee will be restrained from suing on his bond whilst he remains in possession, there is no instance, where the equity of redemption can be opened by proceeding on a collateral security; for when the estate has been sold *bonâ fide*, the redemption which is said to be re-opened, dwindles into a mere matter of account, the mortgagee suing for the difference, and not being able to restore the estate; and that unless the mortgagee could sue on his bond before sale, the value of his collateral security would be reduced to a mere nullity. On the whole, therefore, it is submitted that Lord Eldon's conception of the doctrine contains a correct statement of the law, viz. that *whether the estate be sold, or whether it remain in the possession of the mortgagee, he may sue on his collateral security*; and that the observations of Lord Erskine in *Perry v. Barker*, which appear to have been a surprise upon him, also contain a true transcript of the law, namely, that the mortgagor being once foreclosed must lose his estate though of greater value than the money advanced on it, and if of less value, then that the mortgagee might recover the deficiency by suing on his bond, re-opening the redemption, and procuring a second foreclosure,—to do which, it would

Reasons for opinion that he can.

[1078]

condition, annexed to his estate; yet, as this is requiring to have strict law, and often attended with actual injustice, and the payment of the money is the essence of the contract, and effects substantial right between the parties, the court is willing to seize any opportunity, either of an actual or implied consent of the mortgagee to open the foreclosure, and let in the mortgagor to redeem.

*Bill of revivor
by mortgagee
for account of*

But a bill of revivor, and supplemental bill, will be no waiver of a decree to foreclose (y). Thus, where, in 1717, a bill was

(y) *Birch's case*, Gilb. Rep. Eq. 186.

*Of giving notice
of sale after
foreclosure.*

be next to impossible that the mortgagee (without fraud) should obtain the fee simple of the estate for less than its actual value, or receive more than the money he really advanced.

The learned author suggests the propriety of giving the mortgagor notice of the intended sale after foreclosure, in order that he may have an opportunity of redeeming if he pleases, and to prevent any objection, or the foundation of fraud in transacting the sale. In the above mentioned case of *Perry v. Barker*, it was contended for the plaintiff that the mortgagee could not proceed to sale before he decided whether he would consider the estate a pledge or not; he could not determine by the event, but was bound to give notice to the mortgagor of his intention to sell, especially if he proposed a sale by auction, which might not go near the value; and that he must give notice that he meant to sell as a trustee, and put it out of his own power to take the surplus, if any should arise after deducting his principal, interest, and costs. Such a precaution, though not absolutely necessary, is worthy of attention if the mortgagee sells with an impression that the produce will be insufficient for his reimbursement, but the necessity of pinning himself down to account for the residue can neither be supported nor recommended.

*What course
mortgagee
should follow,
when he con-
ceives estate to
be of less value
than debt.*

If the mortgagee is apprehensive that the estate will prove of less value than his principal, interest, and costs, the course open to him, is to take possession of the premises by ejectment, and then sue on his collateral securities. He may afterwards foreclose and sell the estate, in which case no inconvenience would ensue, except that if he first recovers the whole money on the bond or covenant, he would, by the foreclosure and sale obtain a double payment, which however neither the court nor the mortgagor would permit. Whereas, if the mortgagee foreclose in the first instance, the mortgagor's executor, seeing him in possession, apparently as absolute owner, might distribute the assets, and leave little or nothing for the attachment of the personal bond or covenant; as to which it is observable, that if the mortgagee sue on the bond, he must sue for the whole money, if on the covenant he may lay his damages at any stated amount.

*Mortgagee sel-
ling after fore-
closure can
make good title
to purchaser.*

On the whole doctrine a question very naturally arises, whether a mortgagee in fee having foreclosed, can convey the fee simple and inheritance to a purchaser, without the concurrence of the mortgagor or his heirs, and whether he can guarantee an unimpeachable title to such purchaser, and compel a specific performance. It is presumed that he can, and that all future openings of the redemption will not affect the buyer. Such is the tenor of all the authorities on this subject, and though it is common to direct all proper parties to convey in the decree of foreclosure, yet that it is conceived is added with a view to embrace any empty outstanding estate in the mortgagor, or those claiming under him. The reverse would level the remedy by foreclosure to a mere name. The consequence is, that after foreclosure and sale, the redemption cannot in fact be revived. The relief which the mortgagee obtains by suing on his bond after foreclosure and sale, is, by bringing in the deficiency: but the redemption is so far opened as to make him accountable for the *bonâ fide* price of the sale.

brought to redeem, or be foreclosed; and likewise a cross bill to redeem, on which there was a decree to be let in, on payment of principal, interest, and costs, or else to be foreclosed: the mortgagor died; and the account being taken, the plaintiff, finding the estate insufficient, brought a new bill of revivor, and partly a supplemental bill, both to review the former decree and proceedings, and likewise to have an account of the assets of the defendant, the mortgagor, and thereout to have satisfaction for a bond, which was given, as a collateral security, with the mortgage. The defendant, who was the executor of the mortgagor, pleaded the former decree, in bar; insisting, that the plaintiff had elected his satisfaction, and had not so much as suggested, that it was deficient, so that it did not appear, but that he might receive a double satisfaction for his debt; and that it was plain he had not waived the mortgage by his bill of revivor. The plaintiff insisted, that it was the practice of the court, that taking out of process, or making use of any counter-security, was, in itself, a waiver of the foreclosure; and that a mortgagee had always his election to waive, and open the foreclosure, and to have recourse to his bond and covenant, if he thought proper. But the court was of opinion that the plaintiff, by his revivor, had not waived the mortgage, or so much as suggested a deficiency; and the plea was directed to stand for an answer, without liberty to except.

assets and satisfaction of bond, without suggestion of deficiency, no waiver of decree to foreclose.

[1079]

Except in the instances already mentioned, I do not find that any rules have been, nor, do I apprehend, any can be laid down by courts of equity, as to the exercise of their jurisdiction in opening foreclosures, either with respect to the time, which shall be considered as a bar, or to the particular circumstances, which will entitle a suitor to this interposition of the court; for cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends, in a great degree, upon its own combined circumstances; and may be rather considered, as an instance of the fact, that the courts will interfere to open a foreclosure, than as a general rule, as to the circumstances in which relief will be given.

Not settled what circumstances will open foreclosure.

[1080]

Thus, a decree of foreclosure was opened, after sixteen years, where the bill was against a mortgagee, who had obtained his security, part by original mortgage, and part by assignment, procured under colour of being a friend to the mortgagor; but, in truth, with a view to get him into his power, that the mortgagee might, upon his own terms, purchase his estate, which was worth

Decree opened after sixteen years, on case of fraud.

three times as much as the money that had been advanced thereupon (z).

Motion by mortgagor (six years after his consent to foreclosure) for time to redeem, rejected in D. P.

[1081]

But where the mortgagee, in 1711, entered into possession, upon a foreclosure made absolute by consent, and, considering himself as having an absolute estate in the mortgaged premises, by virtue of the decree, proceeded to make improvements thereon, by pulling down buildings that were ruinous; the mortgagor, six years after, in 1717, moved the court for farther time to redeem; and it was so ordered upon terms (a). But this, and several other orders grafted thereupon, similar in their nature, were reversed, on appeal to the House of Lords, upon the grounds, that it was not consistent with the practice of courts of equity, or warranted by precedents, to enlarge the time for redemption, after the mortgagor's acquiescence for six years, under a foreclosure, by his own consent; especially, after an alteration had been made in the estate, either by pulling down the buildings, enlarging them, or otherwise; that the appellant had been two years in possession, before he began alterations on the estate, when he might look upon it as his own, having such a title as would satisfy a purchaser; and that the money, reported due to the appellant, amounted to as much as the clear rent, at fifty-eight years purchase, exclusive of subsequent interest and costs that would incur, if the litigation were suffered to proceed.

Foreclosure not opened by consenting to examine witnesses.

[1082]

Foreclosure not opened on ground of under value or parol permission to redeem (x).

In the last case, the mortgagor urged, the appellant's acquiescing at first in the order made in 1717, in the examining witnesses, and not opposing the subsequent orders for enlarging the time, as amounting to an admission, that those orders were just, and that the estate in question was still redeemable.

So, in the case of *Wichalse*, executor of *Wichalse v. Short*, neither over-value in the estate, nor a parol agreement to redeem, were held by Lord Cowper and Lord Harcourt, Chan-

(z) *Burgh v. Langton*, 15 Vin. Abr. 476, pl. 2. S. C. 2 Eq. Ca. Abr. 609, pl. 5. 2 Bro. P. C. 544, [et vide antea, p. 976 and 978, of this edition, n.(Q)], for two cases, where the redemption was opened, after foreclo-

sure, on the ground of fraud and collusive dealing.—*Ed.*]

(a) *Lant v. Crispe*, 2 Bro. P. C. 111. 2 Eq. Ca. Abr. 509, pl. 21. 15 Vin. Abr. p. 467, pl. 16 and 469, pl. 13.

Text confirmed.

(K) In *Cox v. Peele*, 2 Bro. C. C. 334, a bill was filed to carry into execution a parol agreement (entered into by the parties by means of their solicitors), that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal and interest, and that the remainder should be handed over to the mortgagor. This bill was dismissed at the Rolls, as within the statute of frauds. On appeal to the Chancellor, evidence of the agreement was read *de bene esse*, but the decree was affirmed.

cellors, to be sufficient reasons to open a foreclosure after twenty years (b); and their decree was afterwards confirmed on appeal to the House of Lords.

In that case W., the plaintiff's late husband, having mortgaged his estate at L., to several persons, and the mortgagees pressing for their money, the defendant S. was prevailed on to advance 1000*l.* for discharging those incumbrances; and, accordingly, the former mortgages were assigned to him by deed, dated the 29th of September, 1691. He afterwards advanced to W. a farther sum of 500*l.* on the 3d of December, 1692; so that the estate then stood mortgaged to him for 1500*l.* and interest.

Neither principal or interest being paid at the time limited by the mortgage, or for above two years afterwards, S., in 1694, exhibited his bill against W., in order to foreclose; to which bill, W. put in an answer, admitting the 1500*l.* and interest to remain due, and offering to pay the same, at such time as the court should appoint; but desiring a reasonable time to sell his estate for that purpose.

On the 10th of July, 1695, this cause was heard; and a reference was made to a Master to compute the sum due, &c. and, on payment thereof by W. at or before Lady-day then next, he was to have a re-conveyance from the plaintiff; but, in default thereof, to stand foreclosed; and it was decreed, by consent, that if, in the mean time, W. could procure a purchaser for the estate, S. should join in a sale thereof.

The time for payment, appointed by the Master, which was the 29th of August, 1696, was afterwards enlarged to the 24th of July, 1697, when, the money not being paid, nor any purchaser of the estate procured, the decree of foreclosure was, on that day, made absolute, and, it being afterwards duly signed and inrolled, S. was put in possession of the mortgaged estate.

The mortgagor lived above eight years afterwards, but never attempted to open the foreclosure, or to disturb S. in his possession; yet he, nevertheless, took upon him to devise this estate to his wife; who, in Hilary Term, 1708, about three years after her husband's death, exhibited her bill in the court of Chancery against S. praying an account of the rents and profits of the premises, and to be let into a redemption of the estate upon a

Fourteen years after foreclosure mortgagor devises estate to wife, who files bill to redeem, on ground of repeated promises by mortgagee to her husband, that he would reconvey on payment of money. Bill dismissed.

[1083]

[1084]

(b) *Wichalse, Executor of Wichalse v. Short*, 1 Bro. P. C. 414. 2 Eq. Ca. Abr. 177, pl. 1. 7 Vin. Abr. 298, pl. 15. 15 Ib. 478, pl. 2. [S. C. 1 Ch. Ca. 218.—Ed.]

Wichalse v. Short.

suggestion that the former decree and proceedings had been obtained by collusion.

To so much of this bill as sought to lay open the foreclosure, the defendant pleaded the enrolled decree, and his possession under the same in bar; and, by his answer, denied any collusion in obtaining that decree. And upon arguing this plea before Lord Chancellor Cowper, it was allowed.

[1085]

But the plaintiff having replied, and witnesses being examined, the cause was heard before Lord Chancellor Harcourt, in April, 1714; when his Lordship declared, that the defendant had fully proved his plea, and therefore dismissed the bill with costs; which decree of dismissal was afterwards affirmed, on appeal to the House of Lords.

It appears, both from the reasons suggested by the parties to the appeal to the House of Lords, and by the report of this case (c), that the plaintiff, in the original suit, did not rest solely upon the ground of fraud and collusion, in the original decree for foreclosure, but also relied upon frequent promises made, subsequent to the decree, by the mortgagee to the mortgagor, to be accountable for the rents, and to re-convey on the repayment of his money, and likewise upon the value of the estate, which was considerably more than what was due to the respondent. But Lord Harcourt, in giving his opinion, said, that the plaintiff came too late; for that he knew no instance where a man had been let in to redeem, by a new bill, after a decree of foreclosure signed and enrolled, upon any parole agreement or declaration, or *by reason of any over-value of the estate*; such a practice would be of dangerous consequence, and shake abundance of titles (L).

[1086]

Husband's bill to redeem in last case would perhaps have been entertained.

But it is observable, on the principal case, that the mortgagor *himself* had acquiesced, during his life-time, under the decree; and that the plaintiff's claim was that of a voluntary devisee of an equity of redemption, which had been duly and regularly foreclosed, *near seventeen years before*: for, perhaps a difference would be made if the application came early, and was from the mortgagor himself (cc); especially, if all things were in

(c) 2 Eq. Ca. Abr. 177, pl. 1, in *notis.* (cc) [This is very questionable, at the present day.—Ed.]

Foreclosure not opened by mortgagee's receipt of more than debt out of rents.

(L) The bill in *Mallack v. Gallen*, was to be let in to redeem, alleging, that the mortgagee was greatly overpaid, by perception of the rents of the mortgaged premises; the defendant pleaded in bar, a decree of foreclosure signed, and enrolled, under which the redemption had been absolutely foreclosed. The plea, on agreement, was allowed.

statu quo, and no injury would result to the mortgagee from expenses incurred in repairs, improvements, or otherwise; as, in such case, although the mortgagee hath the legal title, yet the mortgagor seems to have the greater equity. Besides, as the original intention of the parties was a loan, not a purchase, no injustice would be done by giving the mortgagor time to redeem, upon making full satisfaction to the mortgagee. Such a distinction seems to be warranted (d), by the observation of the court in the case of *Roscarrick v. Barton*; in which, redemption was denied to a remainder-man after twenty years; but the Lord Keeper said, that he made a great difference between parties that came to redeem, *who were no parties to the mortgage*, and those that were (M).

[1087]

The mortgagee calling it a debt, in his will, to a collateral purpose only, will not alter the nature of the estate the mortgagee hath in the premises, after a foreclosure made absolute, and many years possession by the mortgagee.

Mortgagee devising his interest in estate as debt, insufficient to open foreclosure (N).

Thus, where Charles Stuteville (e), 1674, 1675, 1677, and 1678, made several mortgages of his estates, in the county of S., to Sir Francis North, for securing several sums of money, amounting in the whole to 2300*l.*; and, in 1682, Sir Francis North, in consideration of 2386*l.* 5*s.* paid to him by Lady Glenham, assigned over all his securities, upon this estate, to her and her trustees. Lady Glenham, having another demand upon Stuteville, of 800*l.* she, in Easter Term, 1682, exhibited her bill in Chancery, praying, that he might either pay her both those debts, with interest and costs, or be foreclosed of his equity of redemption. The cause being heard in Easter Term, 1683, the defendant was decreed to pay both debts, with interest and costs, by a limited time; and, in default thereof, that he should be foreclosed; but, he neglecting so to do, the foreclosure was afterwards made absolute, and the decree in-rolled.

[1088]

In May, 1684, Lady Glenham assigned this decree, and all her interest therein, to Mr. Justice Dolben; who being kept out of possession, did, in 1693, bring several ejectments, and

(d) 1 Ch. Ca. 220, *supra*, 1050.
(e) *Troke v. Bishop of Ely*, 1 Bro. P. C. 119. 15 Vin. Abr. 476, pl. 1, marg. 2 Eq. Ca. Abr. 608, pl. 1.

[S. C. Sel. Ca. Ch. 10, cited, where it is said the judge took time to consider, but the parties compromised. —Ed.]

(M) The case of *Roscarrick v. Barton*, has long since been over-ruled; see *antea*, 972, of this edition, n. (P).

(N) See similar law in *Silberschildt v. Schiott*, 3 Ves. & Bea. 45, and *antea*, 423, of this edition, n. (P).

*Tooke v. Bishop
of Ely.*

thereby recovered part of the premises; the residue being held by Mrs. Stuteville, the mother of Charles, as having an estate for life prior to the mortgages.

Soon afterwards, Justice Dolben died, having made his will, and thereof constituted Sir Gilbert Dolben sole executor and residuary legatee; but in this will was the following clause: "And, if Mr. Stuteville's debt be well paid, as I doubt not but it will, I order my executor, Gilbert Dolben, to pay the sum of 4800*l.* amongst the children of my nephew, John Dolben." And, upon calculation, this sum of 4100*l.* exactly agreed with the money decreed to be paid, with the interest thereof, from the time of the decree to the date of the testator's will.

[1089]

Upon the death of Mrs. Stuteville, Sir Gilbert brought an ejectment, and recovered the lands held by her, so that he was in possession of the whole estate.

In July, 1694, Charles Stuteville exhibited his bill in Chancery against Gilbert Dolben, praying, that he might be at liberty to redeem, on payment of the mortgage-money, and interest; but, to this bill, the defendant pleaded the former decree of foreclosure, and insisted, that the plaintiff ought not to be let in to a redemption.

On the 10th of July, 1695, this cause came on to be heard before the Lord Chancellor Somers, when the defendant's plea was allowed; but his Lordship recommended an accommodation, and accordingly it was ordered, by consent, that the defendant should be at liberty to redeem, upon payment of principal, interest, and costs, to be computed by the Master. The plaintiff, however, not complying with this order, nor being willing to abide by this judgment of the court on the plea, moved for leave to amend his bill; and this the court thought proper to grant, on condition of his giving his own recognizance not to disturb Gilbert Dolben, or his tenants, or commit waste; but if he refused to comply with this condition in a month, then his bill was to be dismissed with costs, without farther motion; and Stuteville not complying with this order, his bill was dismissed accordingly.

[1090]

Stuteville, still apprehending he had a right to redeem, by deed, dated the 24th of May, 1700, settled the premises upon trustees, in trust to sell, and pay Sir Gilbert Dolben and all his other creditors; and then, in trust for himself, his heirs, executors, administrators, and assigns. He also made his will, and thereby devised all his estate, real and personal, and his equity of

redemption in the premises, unto Catherine Tooke, her heirs, executors, administrators, and assigns, and soon afterwards died. *Tooke v. Bishop of Ely.*

In December, 1702, eighteen years after the decree of foreclosure, Sir Gilbert Dolben assigned over all his estate and interest in the premises to the bishop of Ely, in consideration of 8000*l.* who afterwards purchased of the representatives of Mrs. Stuteville, a debt of 5800*l.* due to her for the arrears of her jointure, and for which she had obtained a decree, whereby the whole stood charged with the debt. [1091]

In June, 1703, Catherine Tooke exhibited her bill against Sir Gilbert and the Bishop of Ely, praying a redemption of the premises, on the foot of Lady Glenham's decree; and that she might have a re-conveyance, and an account of the rents and profits. To this bill, Sir Gilbert pleaded the decree of foreclosure, the Bishop likewise pleaded that decree, and his several purchases from Sir Gilbert, and from the representatives of Mrs. Stuteville; and upon arguing these pleas, before the Lord Keeper Wright, on the 21st of July, 1704, they were allowed.

From this order, the plaintiff appealed; insisting, principally, that, by Mr. Justice Dolben's will, and the subsequent proceedings, the foreclosure was opened; and that nothing had been since done, to bar the appellant of her equity of redemption.

On the other side it was contended, that Sir William Dolben's calling it a *debt* in his will, to a collateral purpose only, could not alter the nature of the estate he had in the premises, any more than the calling a leasehold estate an estate in fee-simple, would have converted the leasehold into a freehold; that the Bishop of Ely was a purchaser of the estate, at a very great price, under a decree which had been signed and inrolled above twenty years, and which had been twice allowed, as a good bar of the redemption: and so it was held by the Lords, and the appeal was dismissed, and the decree and order was affirmed. [1092]

Nor will a decree of foreclosure be set aside, after twenty years, for matter of form only; not even although the estate become of considerably more value than the money lent thereon: but a demurrer to such bill will be good (*f*). *Foreclosure not set aside after twenty years, for matter of form only (o).*

(*f*) *Jones v. Kenrick*, 15 Vin. Abr. 470, pl. 18. S. C. 3 Bro. P. C. 315. 2 Eq. Ca. Abr. 602, pl. 31.

(*o*) A foreclosure will not at any time be set aside for want of mere matter of form in obtaining the decree, especially if twenty years have elapsed since the decree was pronounced. This is, perhaps, the more correct expression of the doctrine in the text.

No decree against part of estate sold, if remainder will satisfy mortgage.

[1093]

Reversion decreed to be sold to satisfy debt (a).

[1094]

Personal fund deficient, and mortgagor dead, mortgagee may pray sale (n).

If tenant in tail of an estate (g), subject to a mortgage, suffer a recovery, and sell part thereof, and afterwards the mortgagee exhibit a bill for foreclosure or sale; though, in law, he hath a right to have all the parts of the estate liable to his satisfaction, yet the equity is, that the part sold should not be meddled with, unless the remainder be not sufficient for the satisfaction of the mortgagee (p).

On mortgage of a *reversion*, and decree to redeem, instead of the alternative, "*or the mortgagor to be foreclosed*," the court decreed, that the mortgagee *should sell to satisfy the debt*. Thus (h), where G. being in his life seised in fee of a reversion of lands depending upon the life of H. by deed, dated the 25th of November, 18 Jac. mortgaged the lands to A. and K. and their heirs; afterwards the mortgage became forfeited; when K. by deed, dated 1st March, 22 Jac. released all his right, title, interest, claim, and demand, in the lands unto A. and his heirs for ever. A., by his will, devised the said premises to L. in fee. L. being a merchant, and his livelihood consisting in the returns of money, and the consideration in the said deed of mortgage being 340*l.* disbursed in 18 Jac. upon a dry reversion, exhibited a bill to oblige the heirs at law of the mortgagor to repay the money, with damages, or else to have the lands decreed to him, to the end that he might sell them; and so the court decreed.

And if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale of the mortgaged estate in the first instance. But in such case there

(g) *Kirkham v. Smith*, 1 Ves. 261. [S. C. antea, 424 and 426, of this edition, note (Q), and 1056.—Ed.]
(h) *How v. Vigness*, 1 Ch. Rep. 33.

(P) But in this case the purchaser, it is presumed, must be a party, as he may redeem. As to redeeming both estates or neither, see antea, 339, of this edition, n. (Z); and *Stokes v. Clenden*, supra, p. 972, of this edition, n. (N), for a case, where it was held, that one estate could not be foreclosed without making the owner of the other estate a party.

(Q) Where a dry reversion has been mortgaged, it seems natural to say, that since the mortgagee has chosen his security, he shall wait till circumstances render it productive. The courts however adopt a different line of argument, and think it inequitable that a mortgagee should be kept out of his money till the falling in of the particular estate.

(R) Lord Redesdale's notes refer to a case of *Hodgson v. Parker*, 26th July, 1791, to the following effect: "Bill by mortgagee in fee against the personal representative and the heir, for payment of mortgage debt out of the personal estate, as far as it would extend, and the deficiency to be raised by sale of the mortgaged estate. Decree accordingly." It is, however, to be observed on this, that the decree was on consent of the heir, &c. Reg. Lib. 1790. A. fol. 602 b. 2 Bro. C. C. 153, Belt's edition, n. (1).

is a distinction where the same person is heir and also executor, and where those characters are filled by different persons. These two last-mentioned propositions were assented to by the court of Chancery in the following case:—S. (i), deceased, mortgaged the estate in question to D. in fee, and afterwards died, leaving T. his brother and heir at law, who also took out letters of administration. Then D. filed his bill against T., praying an account of the principal and interest due on the mortgage, and also a sale; and in case the mortgaged estate should not prove sufficient to pay the principal and interest due, that the deficiency might be made up out of the personal estate, and in case T. should not admit assets, that there might be an account of the personal estate. In the bill he stated the bond and mortgage, and that the personal estate was deficient; T. by his answer, admitted that the personal estate was very small, and would be deficient, and the cause coming on before his Honor, he ordered according to the prayer of the bill. From this decree the defendant appealed, because it had not ordered an account of the personal estate in the first instance, or that so much of the estate only, as should be necessary, should be sold. *Sed per curiam*; the decree is of course, the heir and personal representative being the same person; though, if they had been different persons, it would have been necessary first to have an account of the personal estate (s).

[1095]

One executor indebted to testator by mortgage, co-executors may pray sale.

Where [there are several executors, and one of them is indebted to the testator, for which he had given a security by way of mortgage upon his estate, if the co-executors are apprehensive that he is insolvent, and that the estate may prove a deficient security, bringing a bill against him to foreclose is improper, because the testator having made him an executor, gives him an interest in the mortgage; the other executors should have brought a bill for sale of the estate (j)—*Ed.*]

(i) *Daniel v. Skipwith*, 2 Bro. C. C. 155.

(j) *Lucas v. Seale*, 2 Atk. 58. [The above is substituted from the report for the two unintelligible lines of the

text found here in the 4th edition, the same case was mentioned postea, 1150, of the 4th edition, where it was considered unnecessary to repeat it.—*Ed.*]

(8) It may be inferred from this case, that a mortgagee cannot pray a sale on the deficiency of the estate to pay his mortgage debt, without praying an account of the personal estate in the first instance, unless the same person embraces the characters of both heir and personal representative of the mortgagor. Mr. Belt, however, conceives it to be the subsisting practice (notwithstanding the doctrine in *Plunkett v. Penon*, 2 Atk. 51, and the decision of *Knight v. Knight*, 3 P. Wms. 331,) to allow a mortgagee to bring a suit against the heir without bringing the personal representative before the court; see 2 Bro. C. C. 155, n. (1), referring to 3 P. Wms. 333, m. (A), and *Fell v. Brown*, 2 Bro. C. C. 276.

Whether when estate is deficient, account of personal estate must be prayed in first instance.

[1096]

Mortgagee may pray sale, if estate be deficient, but sale never decreed on bill to foreclose (τ).

And where the bill was to foreclose, and the defendant appeared (k), and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration, for the bill to be taken *pro confesso*; and the counsel for the plaintiff prayed a decree for sale instead of a foreclosure, because the security was defective, and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree for foreclosure, and he insisted that such decrees were usual. But his Honour said, that he never had known any; but that where the security was defective, it was often indeed referred to a Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*. But in this case he decreed a sale, because the decree was that the bill should be taken *pro confesso*, and not according to the prayer of the bill (υ).

(k). *Dashwood v. Bithazy*, Mos. 196.

Sale may be prayed on supplemental bill, when.

(T) In *Dashwood v. Bythsea*, a case of *Nosworthy v. Maynard* was mentioned, where the security being defective, the cause stood over, and the plaintiffs filed a supplemental bill and prayed a sale.—A sale is at all times much preferable to a foreclosure, as abating the tedious process of the latter, it is liable to be re-opened during the space of twenty years, on grounds which are sometimes trivial, often expensive, and always vexatious. If the mortgagee foreclose the equity of redemption, sells the estate, and sues on a collateral security for the deficiency, he will, we have seen, (antea, 1077,) open the foreclosure, and by that means allow the mortgagor an opportunity of moving for further time to redeem, which may be enlarged almost without stint, and a second foreclosure, with considerable difficulty and much anxiety, at length obtained. It was therefore forcibly, though ineffectually argued, in a late case, that the advantage was too much in favour of a mortgagor; who, though he could stop the suit upon a bill of foreclosure *in limine*, was, by a liberal indulgence, in addition to the necessary delay in the usual course of proceeding, furnished with the means of keeping the mortgagee out of his money at the hazard of all the inconvenience, and even the ruin that might be the consequence, *Perry v. Barker*, 13 Ves. 202. As a general rule, the court will not decree a compulsory sale. The mortgagee may have a foreclosure, but he cannot have a sale without the consent of the mortgagor, except in the following instances; 1st. Where the estate is deficient to pay the incumbrance, *ubi supra*. 2d. Where the mortgage is of a dry reversion, *antea*, 1093. 3d. Where the mortgagor dies, and the reversion descends on an infant, *supra*, p. 1059. 4th. Where the mortgage is of an advowson, *antea*, p. 198, of this edition. 5th. Where the mortgagor becomes bankrupt, and then the mortgagee may pray a sale under Lord Rosslyn's general order, 4 Bro. C. C. 548. And, 6th. Where the mortgage is of an estate in Ireland. *Perry v. Barker*, *antea*, 1004, of this edition, n. (I); and in all these cases, if a sale be not prayed in the first instance, it is presumed it may, in an additional bill.

Sequestrator will be ordered to pay rents received to mortgagee, and give up possession to him if required.

(U) With respect to sequestrations for contempt, which are in the nature of executions at law, the following case lately occurred. On the 7th of April, 1814, a commission of sequestration issued against the defendant, directed to certain commissioners, commanding them to enter upon all the lands, tenements, and real estate of the defendant; and to collect into their hands, not only the rents and profits of the said estate, but also all his goods and personal estate, and retain the same until the defendant should pay the sum of 2,889l. into the bank, clear his contempt, and the court should make an order to the contrary. The acting commissioners seized into their hands the whole of the defendant's estates; whereupon petitions were presented

It seems to have been formerly doubted whether, where there is a debt secured by mortgage, and also a bond debt due from the same person, and the mortgagee exhibits his bill to be redeemed or foreclose, the mortgagor may redeem without discharging the bond debt, as well as that by mortgage; but I apprehend this doubt is totally removed by the modern decisions upon the subject (1). It arose from not attending to the distinction, between an application from the mortgagor to redeem, and one by the mortgagee to foreclose; for we are to observe, that the reason on which that opinion had prevailed in courts of equity, on application made by the mortgagor to redeem, was, because he who wishes to have equity rendered to him, must render it to those against whom he applies for it.

Foreclosure and redemption distinguished as to tacking.

[1097]

Thus, if a mortgagor, after having forfeited his estate in law to the mortgagee, by neglecting to perform the condition to which he had made it subject, applied to equity to enable him to redeem, it was thought just, that when equity interfered to take from the mortgagee the estate, which by law was become absolutely vested in him, care should be taken that the mortgagee was not prejudiced by its interposition; which, viewing a mortgage as a complex transaction, and not simply as a debt, it would be, if other debts that he had let the mortgagor contract, perhaps, in some degree, under confidence that they would be covered by his former security, were left undischarged. But there is no pretence for the interposition of this maxim, where

Mortgagor redeeming, must pay bond debt. Contra if mortgagee forecloses (U).

(1) Vide supra, [347, 351, of this edition.—Ed.]

(U) [See infra, p. 1100 and 1102, in notis.—Ed.]

by two separate mortgagees of the estate, praying that the rents received by the sequestrators might be applied in discharge of the interest on the mortgages, and that the mortgagees might be let into possession. The only question in dispute was, whether the mortgagees were entitled to the rents received by the sequestrators prior to the Master's report, finding so much due to the mortgagees respectively for principal and interest; and it was contended, that the rents were not so applicable, on the ground that a sequestration was in the nature of an execution at law. The Vice Chancellor said, the rents and profits in this case received by the sequestrators were not vested in the plaintiff (the person on whose behalf the sequestration was awarded), but were in *custodia legis*; and there must be a further order before they could be applied for the benefit of the plaintiff; and if parties in the mean time came in, as the petitioners had done, and shewed to the court that the estate was mortgaged to them, they were entitled to the rents and profits in part discharge of what was due to them upon their mortgage, after paying thereout the sequestrators their costs, and the costs of the present application; and the sequestrators must give up the possession of the estate to the mortgagees. *Walker v. Bell*, 2 Madd. Rep. 21. See also *Fawcett v. Fothergill*, 1 Dick. 99. *Bowles v. Parsons*, ib. 142., and *Adams v. Claxton*, 6 Ves. 228, where it was held, that parties claiming a mortgage on sequestered estates must come to be examined *pro interesse suo*.

[1098]

a mortgagee comes to foreclose; for his intention is to shut out the mortgagor from his equity, and strictly to enforce his own legal title. In such case therefore, the mortgagee electing for himself, and choosing to have a strict performance of the contract, the only equity which he is entitled to against the mortgagor, seems to be, to be decreed exactly that which the law would give him, and for which he hath stipulated, namely, the land or the mortgage-money only.

First mortgagee lends money on bond, and files bill for foreclosure. Second mortgagee files cross bill to redeem, bond not tackable to mortgage.

And it seems to have been so determined, in the case of *Sharpnell v. Blake* (m), which, as to the point in question, was thus: B. being seised in fee of a copyhold estate held of the manor of ———, upon the 5th of October, 1725, made a conditional surrender of it to the plaintiff S. to secure 400*l.* and interest, and afterwards borrowed 50*l.* of S. upon bond, Then B., by two surrenders (the first dated 26th May, 1733, the other 27th May, 1734) mortgaged his estate to the defendant T. for 650*l.* The 29th of August, 1734, B. became a bankrupt. Some time in October following, S. delivered ejectments against the tenants to get possession of this estate. Upon 30th October, the defendants T. and H., as assignees, gave S. notice that they would pay him his money due upon the mortgage, the 11th November following. Upon the 6th November, 1734, S. not having attended at the time and place appointed to receive his money, filed his bill for a foreclosure. T. brought a cross bill to redeem B.'s mortgage, upon payment of principal and interest: S., the defendant in the cross cause, insisted upon being paid the bond-debt of 50*l.* as lent upon security of the mortgage; for that, at the time of lending, it was so agreed, and charged that T.'s mortgages were only colourable and fraudulent, to cover the estate from debts. T. was B.'s son-in-law, and had made no proof, in the cause, of the payment of the pretended consideration-money for the two-mortgages; but the Lord Chancellor held, that this bond-debt could not possibly be tacked to the mortgage.

[1099]

And his Lordship, in delivering judgment upon this case, observed, that it had been settled, that a mortgagee might insist upon being paid a bond debt *against* the mortgagor (x);

(m) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34.

Bond not tackable to mortgage against mortgagor or creditors.

(X) The report reads thus:—"By all the late cases, a mortgagee can insist upon being paid a bond debt, even against the mortgagor himself; and it is still stronger against a second mortgagee, or assignees of a commission of bankruptcy; and in the latter case, the creditor is not entitled to the whole debt, but rateably and proportionably with the rest of the cre-

that the case was still stronger *against* a second mortgagee or assignee of a commission of bankruptcy (*n*); and that there must be an enquiry before the Master, or by directing an issue, whether any money was lent upon these mortgages, in order to determine to whom the equity of redemption belonged, *viz.* [1100] whether to the assignees, or to the plaintiff in the cross cause in his own private right. The decision, as to tacking the bond debt, is not reconcilable to the observation made by the Chancellor, on any other ground, than that of S.'s being plaintiff in the bill to foreclose; that seeming to be the only difference, in his Lordship's mind, between this case, and the case cited by him as settled; the right between the puisne mortgagees and the assignees remaining undetermined (*Y*).

(*n*) *Quære*, et vide *supra*, [353, of this edition.—*Ed.*]

ditors." The whole of this sentence, to say the least of it, is very confused, and even contradictory. A mortgagor coming to redeem, may pay off the mortgage without the bond. See *antea*, 348, of this edition, in the text. And it is clear that where a mortgagor has assigned his equity of redemption in trust to pay his debts, the mortgagee cannot tack his bond to his mortgage, but must come in with the other creditors *pro rata*, as to the bond, *antea*, 353, n. (O). The same may be said of assignees under a commission of bankruptcy, though no case directly decides that point. The above passage, therefore, cannot now be received; but a slight alteration would restore both the law and the sense. Thus, if the word "even" were altered into "not" or "not indeed;" the obvious contrariety between the former and latter limb of the sentence would then be reconciled.

(*Y*) In answer to the claim of tacking, it was merely necessary to say that there were creditors, against whom the mortgagee could not tack his bond to his mortgage, but must come in *pro rata* with them under the commission, as to the bond debt. See preceding note. It was not necessary, therefore, to refer to the above distinction between a bill of foreclosure and a bill to redeem, and it is observable, that the court itself did not allude to any such distinction. The learned author first supposes a point of difference, and then by an extremely forced construction, presumes that the court proceeded upon it, saying, that the decision is not reconcilable with former observations of the court on any other ground. But it has been shewn, that other substantial grounds existed; and it should be recollected that the Judge came to no decision on the subject, but merely directed an enquiry to whom the equity of redemption belonged. The learned author is therefore without authority for his distinction; and it should be noticed that the cases lean entirely on the other side, disregarding the above supposed difference, and tending to establish the principle, that a mortgagee, in foreclosing an heir at law, may tack his bond to his mortgage, if by so doing he will injure no other creditors. Many instances have occurred where the mortgagee has filed a bill of foreclosure and claimed a right to tack a bond debt to his mortgage, and it has been disallowed, not because it was on a bill of foreclosure, but upon other merits,—as that a bond debt was not tackable to a mortgage against the mortgagor or against creditors, or that a simple contract debt was not tackable to a mortgage. See *Price v. Fastwedge*, Amb. 685. *Hamerton v. Rogers*, 1 Ves. jun. 513. *Newby v. Cooper*, Finch 379. In all these cases the bill was for a foreclosure, and the above distinction was not alluded to, when, if it were a sound distinction, it would have decided the cases at once, without the necessity of recurring to other grounds. The next note will shew, that the doctrine of the text does not prevail to prohibit the tacking of a judgment to a mortgage, where the bill is for foreclosure; and it may with equal reason be asked, why it should prevent the mortgagee from tacking a bond debt to his mortgage, if no

Distinction in text untenable.

Mortgagee foreclosing heir, may tack bond to mortgage.

Bond restrained within penalty, where exit is by obligee, but extended beyond it, (when necessary) if application be by obligor (oo).

[1101]

This distinction, between cases where the application to equity is made by the mortgagor, and cases where it moves from the mortgagee, is analogous to a rule laid down on occasions not very dissimilar, namely, where equity is required to carry the debt beyond the penalty of a bond (o); for where the plaintiff came to be relieved against the penalty of a bond, it was so decreed, upon payment of the principal, interest and costs, though they exceeded the penalty; and the decree was affirmed upon an appeal to the House of Lords. So, where lands were extended on a statute of judgment (p), at much less than the real value, and the consor came into equity, to make the co-nusee account according to the real value, he could not be relieved without paying all that was due for principal, interest, and costs, although they exceeded the penalty; but where the vendor of lands entered into a recognizance of 1000*l.* for quiet enjoyment, which was forfeited (q); though the loss the vendee sustained was much greater than the penalty, yet, upon application by him, the court would not go beyond it. And where a trustee of a recognizance released it (r), without any consideration, upon a bill by the *cestui que trust* against the trustee, the court decreed him to pay the principal and interest, so as it exceeded not the penalty. And even (s), where a settlement or devise was made of lands for payment of debts, and there was a bond debt, the interest of which had over-run the penalty; although such conveyances for payment of debts are construed

(o) 1 Eq. Ca. Abr. 92, pl. 10. Show. P. C. 15. [S. L. *Atkinson v. Atkinson*, 1 Ball & Bea. 239.—Ed.]

(oo) [The numerous cases on the subject of carrying interest beyond the penalty of a bond, cited in the note (O), antea, p. 355, of this edition, do not support the above distinction, nor in any of them was the

above doctrine even remotely hinted at.—Ed.]

(p) 1 Eq. Ca. Abr. 92, pl. 8. 1 Vern. 350. [S. L. *More v. M'Namara*, 1 Ball & Bea. 309.—Ed.]

(q) *Bidlake v. Arundel*, 1 Ch. Rep. 95.

(r) *Ivion v. Bush*, 1 Vern. 342.

(s) *Anon.* 1 Salk. 154.

other reason intervenes to prevent him? Is there any equitable principle which tends to discourage the recovery of what has been in good faith advanced? or if it be admitted, that on a bill to redeem, the mortgagee may insist on the tacking of his bond to his mortgage, is there any sound reason why, on a bill to foreclose, he should be deprived of that right, when, by allowing it, no other person would be injured? On principle, therefore, it is submitted, that the learned author's distinction in the text, is without foundation, and if any thing to the contrary can be inferred from note (K), to page 351, antea, of this edition, (a note written without due attention to the want of authority in this place) the Editor desires to retract it, as, on reconsideration of the cases there quoted (except *Newby v. Cooper*), he cannot find one that supports the position, that an heir at law will not be bound to pay a bond debt as well as the mortgage-money, where the bill is for foreclosure and not for redemption. The latter part of the note to page 526 of this edition is affected with the same vice. See also page 558, sec. 6, in *notis*, and correct in the twenty-eighth line of the note there the words "mortgagor and his heirs," to "the mortgagor's heir."

favourably, yet the creditor, on a bill brought by him, was restrained within the amount of the penalty. The reason why this indulgence is given, on applications by the obligor, and uniformly objected to, on suit of the obligee, is because the obligee has chosen his own security, and made himself judge what recompence he shall have, in case there be a breach in performance of the agreement (*t*); and therefore there is no equity to enlarge or better his security: but where the obligee is defendant, he is entitled to all that is due, before any equity can arise in the obligor. So, in the principal case, the mortgagee having contented himself with a bond for the latter money lent, there is no reason to better his security, by tacking it to the mortgage, and making it a lien on the land, which he might himself have done, had he thought proper, either by a new mortgage or an indorsement upon the old one.

[1102]

And, I apprehend, that the law would be the same, although the subsequent debt were by judgment or recognizance; for such creditor cannot be called a purchaser, nor does he lend his money upon the immediate view or contemplation of the cognizor's real estate; and though the cognizee has thereby a lien upon the land, yet that arises from the operation of law, and not from any specific agreement between the parties; and therefore, if the principle before stated, *viz.* that on a bill to foreclose, the mortgagor may redeem on performing his original contract, *viz.* by payment of the mortgage money, without having any other terms put upon him, be true, the mortgagee will be left, as to his judgment, to his remedy at law.

On bill to foreclose, mortgagor may redeem without paying judgment or recognizance. Semb. (z).

[1103]

Where the mortgagee brought his bill to foreclose the defendants (*u*), if the money was not paid in a reasonable time, and a decree was made by default, and it was prayed for the

Mortgagee allowed costs of ejectment and foreclosure, but

(t) 3 Bac. Abr. 650.

(u) *Anon.* Mos. 45. [S. C. 2 Mod. 174.—Ed.]

(Z) The learned author's doctrine here, as well as that alluded to in the preceding note, is without support from either principle or authority. It has uniformly been disregarded, and consequently has not been over-ruled, or observed upon in any printed report, in express terms. In a former note (antea, p. 525, of this edition, n. (W)), the case of *Baker v. Harris* is introduced, where Sir W. Grant, M. R. held, that when circumstances arise in which the doctrine of tacking takes place, the judgment or statute tacked to the preceding mortgage becomes as much part of the mortgage as the sum originally lent, and is to be considered as equally secured by it. In that case, the bill was against assignees of a bankrupt for foreclosure: they offered to redeem on paying the mortgage only, without the judgment, contending that, as to *that*, the mortgagee should come in with the other creditors *pro rata*. But Sir W. Grant decided (passing by the circumstance that the bill was filed by the second mortgagee, to be redeemed or foreclose) that the judgment was tackable to the mortgage. See 16 Ves. 397.

Mortgagee foreclosing, may tack judgment to mortgage.

not costs of cross cause on bill filed by defendants, who might prevail or not (M).

[1101]

plaintiff, that, in case the defendants redeemed, the plaintiff might be decreed not only his costs at law, of an ejectment, which he had brought to recover the possession, and in the then cause, but likewise in a cross cause brought by the defendants, and then depending: The Master of the Rolls refused to decree him the costs of the cross cause, because he could take no notice, that there was such a cause depending, and the plaintiffs in that cause might proceed, and prevail; and if they did not go on, the cause might be set down *ad requisitionem defendantis*, and he would have costs. But the counsel for the plaintiff said, that the decree then would be only personal, and they should have no security for their money, and the plaintiffs in that case might be beggars, and insisted they were entitled to all costs they were put to by this mortgage, and quoted a case at law, which he said was much stronger than this, where the court would not relieve against the penalty of a bond, till the obligee paid the costs of the former trial, in which the obligee had been non-suited. But no more was said (A).

Mortgagee must bear expense of completing title after foreclosure.

No foreclosure against crown.

Foreclosure cannot be set down as a short cause.

Proof of execution of deed.

5 Geo. 2. c. 25.

(A) The subject of costs has been amply discussed in a former note; see antea, p. 991, of this edition, n. (D). The above case is not very intelligible; little can be deduced from it.

(B) On the subject of foreclosure, these few remarks are relevant.—1st. When the mortgage has been foreclosed, any expence which the mortgagee may afterwards sustain, must be borne by himself; for the foreclosure operates as a new sale and purchase. Where therefore it appeared, that after foreclosure, a surrender was necessary to complete the title of the mortgagee, the defendant was decreed to surrender the mortgaged premises (which were copyhold) at the expence of the plaintiff, the mortgagee. *Hill v. Price*, 1 Dick. 344.

2d. In *Reeve v. Attorney-General*, 2 Atk. 223, cited, Lord Hardwicke said, he remembered a case in the court of Exchequer when he was Attorney-General, in which Mr. Lutwich, the counsel, was the plaintiff: his father had a mortgage in fee on Sir W. Perkin's estate, who was attainted for high treason on account of the assassination plot. Mr. Lutwich brought his bill to foreclose, and made the Attorney-General a party; the court would not decree a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises till the crown thought proper to redeem the estate. Vide *Paulett v. Attorney-General*, Hard. 465. and antea, p. 309, of this edition, text, and note (H).

3d. A bill of foreclosure cannot be set down as a short cause unless by consent. *Rashleigh v. Dayman*, 2 Madd. Rep. 147. In this case Mr. Lovat, of counsel for the defendant, said, he had been informed, that in a recent case of *Williams v. Williams*, in the Exchequer, before Lord Chief Baron Richards, it was held that such a suit could not be set down as a short cause, unless by consent; and Mr. Simpson and Mr. Treslove, who were opposed to him, vouched for the correctness of the statement.

4th. Where A. mortgaged to B., and C. was the only witness to the execution of the deed, and B. died, bequeathing the mortgage to C. and wife and others who filed a bill of foreclosure against A. and subsequent incumbancers; proof of C.'s hand-writing by a third person, was held by the Vice Chancellor sufficient evidence of the execution of the mortgage made by A. to B. *Inman v. Parsons*, 4 Madd. 271.

5th. In *Knowles v. Broome*, 1 Vea. & Bea. 305, time was enlarged for appearance to a bill of foreclosure under the statute 5 Geo. 2. c. 25—notice in the parish church having been prevented while it was under repair.

CAP. XXII.

[1105]

OF OTHER MATTERS RELATING TO MORTGAGES(A).

A MORTGAGE works a severance of a joint tenancy.*Mortgage severs joint-tenancy (A).*

Thus (a), where three persons were jointly interested in the trust of a term of years, and one of them mortgaged his third part; the question was, whether the joint tenancy was severed in such case? and it was compared to the case of a will, which, as we have seen, is revoked *pro tanto* only by a mortgage. But Cowper, Lord Chancellor, held, that a joint tenancy was an odious thing in equity; that as to the case of a will, it might be for the benefit of a mortgagor that his will should not be revoked, but that it was to the disadvantage of the mortgagor, who died first, that a joint tenancy should continue; because

[1106]

(a) *York v. Stone*, 1 Salk. 153. S. C. 1 Eq. Ca. Abr. 293, pl. 1.

(A) This chapter contains, 1st, A case on the severance of joint tenancy by a mortgage. 2d, An enquiry whether the mortgage debt be transferable by parol, from p. 1100 to 1119.—3d, A few cases on the subject of powers, p. 1122 to 1127.—4th, A reference to voluntary mortgages, p. 1127.—5th, Observations on the estate and interest of the mortgagor, 1129 to 1137.—6th, An explanation of the necessity of executing an assignment of a mortgage on the land, p. 1137, 8.—7th, The rule as to appurtenances and fixtures, 1138 to 1140.—8th, A case on the release of an equity of redemption *pendente lite*, 1141.—9th, A statement of the effect of a purchase of an equity of redemption by two mortgagees, p. 1142.—10th, An expression of the rule where there is a particular tenant and remainder-man of the mortgage-money, and the debt is paid in, p. 1145.—11th, A decision on the exoneration of funds between the mortgagor's heir and executor, p. 1146.—12th, The effect of a fine levied after the time stipulated, and a second declaration of the uses, p. 1147.—13th, A statement of the *cestui que trust's* responsibility for the trustees' safe custody of the pledge, p. 1148.—And lastly, an allusion to the manner of pleading a mortgage, and of evidence and costs in over-ruing a plea, p. 1151, to the end.

Contents of chapter.

(B) See also ante, p. 18, of this edition, n. (B). But though a mortgage, which is a partial alienation, will operate as a severance of that odious thing in law—a joint tenancy; yet a mere charge by one joint tenant will not affect his companion who happens to be the survivor; for the maxim is, *fas accrescendi praefertur oneribus*. Co. Lit. 185, a. Therefore, if one of two joint tenants grant a rent charge by deed out of that which belongs to him during his life, the rent charge will be effectual; but, after his decease, it will be void: for he who hath the land by survivorship will hold it discharged, because he is in by survivorship, and claims under the original feoffment, not by descent from his companion. Litt. sec. 286. So, if one joint tenant acknowledge a recognizance, or a statute, or suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it cannot be executed afterwards; but if execution be sued in the lifetime of the consor, it will then bind the survivor. *Abergavenny's case*, 6 Co. 78. But Lord Coke observes, that if he who makes the charge survives, it will be good for ever. Co. Litt. 184, a.

Joint-tenant cannot charge, though he may mortgage, his share.

all his estate and interest went from his representatives to the survivor, unless it were construed a severance.

Whether mortgage debt will pass by parol gift of deed? (c).

[1107]

In the case of *Hassel v. Tynte* (b), a question arose, whether a mortgage could pass by gift by *parol*? There, Lady Tynte, being entitled to a sum of 1000*l.* secured by mortgage upon a real estate, taken in the name of Frances Hales; and being old, and afflicted with a disorder, of which she died about six weeks afterwards, delivered the deeds and writings, relating to the mortgage and estate, to Hassel, in the presence of several witnesses, one of whom proved, that she made use of this expression at the time, *viz.* "I deliver this as my act and deed." Proof was also read of a declaration by Lady Tynte, and particularly one Adderley deposed, that subsequent to the delivery of the deeds, Lady Tynte said, she hoped, that Hassel would be a good girl, for that she had given her a mortgage of 1000*l.* for her own immediate use and benefit. On Lady Tynte's death, a bill was filed by Hassel *inter alia*, to have the benefit of this gift. Several questions were made. First, whether this was a *donatio mortis causâ*? Secondly, whether it was a *donatio inter vivos*? Thirdly, whether it being a gift of a mortgage upon a real estate, it could take effect, or was not void by the statute of frauds and perjuries? Lord Hardwicke said, that the question on the statute of frauds and perjuries was of great delicacy and nicety. Very slight evidence of the gift had been given by one of the witnesses; the other proved the words made use of at the time; but it was difficult to know what construction to put upon them; whether Lady Tynte intended to deliver them to the plaintiff to keep for her. The proof of the declarations seemed to clear up her intention. As to the question, whether it was *donatio mortis causâ*, it looked more like *donatio inter vivos* (d).

(b) Amb. Rep. 318.

(C) This has been treated as a difficult question by the present Lord Chancellor, in *Monkhouse v. Corporation of Bedford*, 17 Ves. 380, without, however, any reference to the perplexity of the case, or to the learned author's very sensible argument for the negative solution of the problem contained in this and the thirteen succeeding pages. Sir S. Toller also treats it as a doubtful point. Toll. on Exor. 236, 4th edition.

Donatio mortis causâ.

(D) *Donatio mortis causâ* is not, in strictness, a legacy, but in the nature of a legacy; and it is not necessary to be proved with the testator's will, but it operates as a declaration of trust upon the executor. Gifts of this kind are not good, unless made by the party in his last sickness, and delivered by him or by his order. *Miller v. Miller*, 3 P. Wms. 357. *Lawson v. Lawson*, 1 ib. 441, and *Blount v. Burrow*, 1 Ves. jun. 546. As an instance of this species of bequest, it has been held, that if a husband upon his death bed, delivers to his wife a purse of a hundred guineas, and bids her apply them to her own use, this will be *donatio mortis causâ*, and effectual, and will not go to the executor or administrator of the husband, if there be sufficient to pay debts without it. 1 P. Wms. 441. See also 3 ib. 356, a similar case. See further next note.

But there was such a sort of *donatio mortis causâ*. mentioned in the civil law ; but, whether it were the one or the other, the question was, if allowable by the statute of frauds ? Perhaps, it would be more favourable to consider it as *donatio mortis causâ*. But it partook something of the nature of a will.

No case had been cited, but that of *Richards v. Sims* (c), [1108] which came on in a very different shape from the present. It was on a bill by an administrator, to have the deeds and writings relative to a mortgage delivered up, and to be redeemed. The defendant insisted upon a *donatio mortis causâ*. Two issues were directed. First, whether the party gave the defendant the deeds ? Secondly, whether he declared, that he forgave the debt ? Both the issues were found in favour of the administrator ; so that it was but a very slight precedent. What had been argued at the bar was very true, that the money was the principal, and the land only the security ; and that the money would pass by will not attested according to the statute (cc) ; and yet here was an interest in land ; and it was a very considerable question, whether it could pass by parol ? His Lordship was very unwilling to give his opinion upon it, and it was not then necessary, and therefore, at all events, he should reserve the consideration of this question.

No subsequent occasion which I have met with has called for a decision of this question. As to the validity of a parol gift [1109] of a mortgage, the importance of which, when it shall arise, is sufficiently evident, if we consider how great a portion of the real and personal property in this kingdom depends upon mortgages, I shall offer to the reader some observations on the subject of a mortgage of land or stock being disposed of by gift.

Among the various methods of alienating and acquiring property in things, recognized by the common law of England, we find that by *gift*, which is distinguishable from other modes of alienation and acquisition by the circumstances, that it is gratuitous, depending upon mere generosity, and not founded on an equivalent, and that the translation of property in this mode, can be affected only by the *actual delivery* of the thing alienated ; for although strictly speaking, and on abstract notions of property, the declaration of the will of the owner to alienate any thing, is sufficient for transferring his property

Gift must be accompanied with actual delivery.

(c) Vide this case cited supra, [144, of this edition, first line in text.—Ed.]

(cc) [As to this, see antea, 427 and 431, of this edition, in notis.—Ed.]

[1110]

therein to the person, in whose favour that will has been plainly intimated ; yet, such declaration of the will merely, is not binding in the law of England, so as to vest a possession, or even impart a civil right of action. But if a man delivered a thing with a design of transferring the property of it, this, before the statute of frauds and perjuries, was sufficient, in our law (in which respect it is conformable with the law of nature, and the civil law) for transferring a full right of property, and vesting it in the alienee.

Since statute of frauds land not passable by parol, except for three years.

Accordingly, Sir William Blackstone (d), in speaking of a feoffment, says, that it may properly be defined, the gift of any *corporeal* hereditament to another ; and by feoffment, which the ancient writers called *donatio* (e), lands and tenements, which lie in livery, might have been passed by livery, by deed or without deed ; and Lord Coke observes, that *do* or *dedi* is the aptest word of feoffment. But since the statute of frauds, no direct gift can be made of any interest in real estates, for a longer period than three years, nor of any trust therein of longer duration, without writing, *unless the trust arises by operation of law.*

Contra of personal things capable of delivery.

[1111]

But a gift of personal things may still be made by word of mouth, attested by sufficient evidence, of which Sir William Blackstone says, "the delivery of possession is the strongest and most *essential*." And so it is laid down in Jenkins's Centuries (f), "that a gift of any thing without a consideration is good, but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis.*" And agreeable to this Sir William Blackstone, in defining a gift, says, "a *true* and *proper* gift is always accompanied with *delivery* of possession (g), and takes effect immediately. *But if the gift does not take effect by delivery* of immediate possession, it is then not then properly a gift, but a contract ; and this a man cannot be compelled to perform, but upon good and sufficient consideration." In the latter observation, Sir William Blackstone differs from Grotius, who considers a gift, as an act of a different species from a contract ; for Grotius says, "all acts, advantageous to others, *except those which are of mere generosity*, are called contracts (h)," and that, "in *all* contracts Nature demands an *equality*." But it is immaterial to our question, whether a gift, not accompanied by a delivery, be or be not a contract, if being a contract, it still is of a nature which

[1112]

(d) 2 Bla. Com. 310.
(e) Co. Litt. 9. a.
(f) Jenk. Cen. 109.

(g) 2 Bla. Com. 441.
(h) Gro. Book 2. cap. 12. sec. 7.

does not impart a *strict* right, by which the giver may be forced to perform his engagement.

Gifts or donations are of several kinds, but there are two species immediately obvious. Gifts or donations *inter vivos*, and gifts *mortis causâ*. The nature of the former I have already pointed out. A gift of the latter kind, namely, a gift in consideration of death, is (according to Swinburne's definition) where a man, *moved with the consideration of his mortality*, doth give and deliver something to another, to be his, in case the giver die; or otherwise if he live, he to have it again. *Gifts distinguished.*

Of gifts in the case of death, there be three sorts (i). One when the giver, not terrified with fear of any present peril, but moved with a general consideration of man's mortality, gives any thing. Another, when the giver being moved with immediate danger, doth so give, that straightways, it is made his to whom it is given. The third is, when any being in peril of death, doth give something, but not so that it shall presently be his that received it, but only in case the giver die. The two former of these kinds of gifts, if the giver do not make express mention of his death, are reputed simple gifts, and so cannot be revoked, but take full effect from the time of making the gift; but the latter is of a qualified nature, depending upon the death of the party. *Three kinds of gifts mortis causâ.*

[1113]

But in donations *mortis causâ* (k), as well as donations *inter vivos*, *delivery* seems to be a *necessary* and indispensable incident (E). *Delivery indispensable in each.*

(i) Swinb. 22, 23.

Drury v. Smith, 1 P. Wms. 404.(k) *Ashton v. Dawson*, Sel. Ch. Ca.*Ward v. Turner*, 2 Ves. 431.14. *Jones v. Selby*, Pre. Ch. 300.

(E) A delivery of stock receipts is not a sufficient delivery to effectuate a *donatio mortis causâ* of the stock itself. Such a gift of stock cannot be made without a transfer, or something equivalent. *Ward v. Turner*, 2 Ves. 444. 431. But delivery of the key of a warehouse, or of a trunk, is considered as a delivery of the contents of the warehouse and trunk for this purpose, *ib. et vide Tate v. Hilbert*, 2 Ves. jun. 116. S. C. 4 Bro. C. C. 291. So delivery of a bond with these words, "there, take that and keep it," in the last sickness of the donor, he dying two days after, has been held *donatio mortis causâ*; and the donee was declared to be at liberty to use the executor's names in suing on the bond, he indemnifying them; and the costs of the suit were directed to be paid out of the testator's estate. *Gardner v. Parker*, 3 Madd. Rep. 184. But these gifts must be in contemplation of immediate death, *Burn v. Markham*, 2 Marsh. 532; and a most clear and satisfactory case must be made out. 1 Jno. Wils. 449. Actual delivery seems also requisite to perfect this description of gift. Thus, where a person supposing himself in *extremis*, caused India bonds, bank notes, and guineas to be brought out of his iron chest, which he ordered to be sealed up, and endorsed with these words "for Mrs. and Miss P." and then directed them to be re-placed in the iron chest, the keys of which he directed to be delivered to his solicitor (who was one of his executors) after his decease, *Delivery of what things will perfect gift mortis causâ.*

Neither mortgage debt (which is chose in action) nor security (which affects lands) transferrable at law by gift.

[1114]

As a delivery is an incident indispensably necessary to a gift or donation, it follows, that nothing can be the subject of it which is not *capable* of being delivered, and therefore the solution of this question, whether a mortgage of lands or stock can be the subject of a gift, must depend upon another question, namely, whether it can be delivered? And in order to ascertain that, we must examine into what the ingredients are of which a mortgage is composed. A mortgage, generally speaking, is made up of a debt, and a pledge for securing it, each of which we have seen the law recognizes as separate and distinct from the other. The debt is clearly a *chose in action*. The security is land or stock, &c. vested in possession in the mortgagee. Now it is perfectly clear that the debt, being a *chose in action*, or right to recover what the debtor is under an obligation to pay, cannot in itself be the subject of a delivery, for it is an incorporeal thing, and corporeal things alone have the capacity of being actually delivered; nor is it transferrable by the law of England, being but a right of action vested in the creditor to recover his debt. It is equally evident that the possession of the security, if it be land, vested in the mortgagee, cannot be divested since the statute of frauds, but by a formal conveyance in writing proper for that purpose; for a mortgage is a lien, and an estate in the land; and therefore, by a devise of land mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee; if for years, the reversion and equity of redemption passes; and if it be stock, a formal transfer will be necessary to divest the possession out of the donor, and if the act done leaves the possession in the donor, it can take nothing out of him at law, nor in equity, unless it gives an equitable remedy on the foundation of a trust.

[1115]

Then as the debt, being a *chose in action*, is incapable of being transferred at law, and as an incorporeal right is not susceptible of delivery; if it passes at all by delivery of the mortgage deeds, it must pass as an incident following its principal the mortgage; but the fact is otherwise, for the debt is the princi-

it was held this was no *donatio mortis causa* for want of a sufficient delivery, and for that the testator continued in possession. *Bunn v. Markham*, supra, S. C. 7 Taunt. 224. The delivery of bank notes under these circumstances will pass them. *Snelgrove v. Baily*, 3 Atk. 214. S. C. mentioned 2 Ves. 442. *Walter v. Hodge*, 1 Jno. Wils. 445. S. C. 2 Swan. 92, where a mortuary gift of bank notes was refused, not on account of the substance of the gift, but for want of evidence. It is said, however, that bills of exchange, promissory notes, or checks on bankers, are incapable of being the subject of donations *mortis causa*, they being only evidence of a contract. Toll. Exors. 182, and 4 Rep. Leg. p. 1—6.

pal and the land the incident. But if that were not the case, and the security were the principal, it is clear a mere gift, with a delivery of the deeds without writing, would not divest lands or transfer stock at law. Therefore, at law, neither the debt nor the security, it seems to me, can be the subject of a gift or donation.

Then let us consider how the case will be in equity. It may perhaps be contended, that as a delivery of the title deeds of an estate, or of mortgage deeds, by way of security, is considered as an equitable mortgage or assignment, so a delivery of such deeds, by way of gift, may amount in equity to a delivery of the thing given; but these cases turn upon distinct principles. It appears to me, that there can be no such thing as an equitable gift or donation, which is not also a legal gift or donation. When a court of equity considers a deposit of deeds as an equitable mortgage or assignment of a mortgage, it reasons by a circuitry. It first considers the transaction as in the nature of an executory agreement or contract, by which the person who makes the deposit, makes himself a trustee for the person with whom he contracts, by operation of law, in consideration of an equivalent, and then enforces that trust as an implied trust, which is clearly out of the statute of frauds. But this reasoning does not apply where there is no equivalent; for there, if it be a contract, it is *nudum pactum*, and, for want of a consideration, gives no civil right which can be maintained in equity, though it may raise a moral obligation on the part of the donor to fulfil his engagement. [1116]

The only case in which a court of equity seems to have given countenance to an equitable donation, *mortis causâ*, is that of *Baily v. Snelgrove*, cited in *Vesey (l)*, and determined by Lord Hardwicke in 1744, where a bond was given in prospect of death. The manner of gift was admitted, the bond was delivered, and it was held a good donation *mortis causâ*. But Lord Hardwicke gives his reasons for that determination in the case of *Ward v. Turner (m)*, and clearly distinguishes that case, and rests it on grounds peculiar to the nature of a bond; for he says, that though it be true that a bond, which is a specialty, is a *chose in action*, and its principal value consists in the thing in action, yet *some property* is conveyed by the delivery, for the property is vested, and to this degree that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that [1117]

Nor in equity.
Semb.

Gift of mortgage and bond distinguished.

(l) 2 Ves. 441.

(m) 2 Ves. 431.

it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in curia*. Another thing (says his Lordship) which makes it amount to a delivery, is, that the law allows it a locality, and therefore a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another. But even in this case Lord Hardwicke expresses his doubts, whether he had not gone too far. But the reasoning, in the above case, does not at all apply to the case of a gift of a *mere* mortgage with delivery of mortgage deeds, for that clearly neither conveys a property, nor vests any interest, at law, in the donee; though the person to whom such mortgage deeds are given should cancel, burn, or destroy them, the estate mortgaged will still continue vested in the first mortgagee, and he may maintain an action of ejectment, and on proving the existence and destruction of the deeds, give parol evidence of their contents. And I should presume, that the debt being the substance, is transitory, and has nothing to do with the locality of the mortgage deeds.

[1118]

Conclusion that
gift mortis
causa of mort-
gage not prac-
ticable.

Then if the case of a bond, though a *chose in action* stands upon its own bottom, and by no means turns upon the validity of a delivery of a *chose in action*; and the question as to a gift of a mortgage, by delivery of the mortgage deeds, be a new one, it is hardly to be presumed that a court of equity, had it the power, would *now* be inclined to show any favour to such disposition; because, so far as it is admitted, it will militate directly against the statute of frauds, and introduce all the mischiefs of nuncupative wills, both of which are strong reasons against supporting such gift upon the foundation of a symbolical delivery by delivery of the deeds. But should such court be so disposed, I should presume it would be under an incapacity of effecting its purpose; for upon revising the proceedings and developing the principles on which these courts act, it will be found that they have never assumed the power of dispensing with any of the incidents annexed to the alienation of property directly, which must be done to introduce the notion of a symbolical delivery in lieu of the *actual* delivery, *inseparably* incidental at law to a *gift*; nor have they considered themselves as warranted to controul the conscience of parties, except where trust, fraud, or accident, have given them jurisdiction over it, neither of which circumstances seem to me to occur in the case in question, which is merely an instance of an imperfect alienation, and resembles the case of a feoffment

[1119]

without livery of seisin; or will of real estate, not duly attested, neither of which can be aided in Chancery.

[1120†]
[1121†]
[1122]

Where there is a general power given or reserved to a person, to charge an estate with money for such uses, intents, and purposes as he shall appoint; it makes it his absolute estate, and gives him such a dominion over it as will render it subject to his debts, and consequently liable to discharge a mortgage, notwithstanding an appointment pursuant to the power.

General power to A. makes estate his, and renders it liable to his debts and mortgages (F).

Thus (r), where a settlement was made of copyhold estates by a father upon the marriage of his son, with a covenant that it should be free from any incumbrance; in consideration of which the son covenanted to re-convey part of the estate after the father's death, or to pay 300*l.* to such person as the father should appoint; the father had, a few days previous to the settlement, created an incumbrance of 300*l.* on the settled estates by mortgage; and afterwards he appointed the 300*l.* to his daughter and died; then the son brought a bill (among other things) to have the estate disencumbered of the mortgage. *Et per curiam*, the plaintiff has a plain equity to have the estate disencumbered of the mortgage, brought on it in fraud of the marriage agreement; then the question is, how far the 300*l.* charged on the estate disjunctively, is liable to indemnify the plaintiff? he is entitled to be reimbursed out of this 300*l.* and interest, if the father's estate is not sufficient. The son's covenant is part of the consideration moving from him, for the settlement made on him by the father, in fraud of which the incumbrance was made; and the question is, whether any person claiming from the father shall take back this estate of 300*l.* out of it, without letting the son, who was a purchaser, have the benefit of the same agreement; which would be contrary to the rules of all agreements, that they must be performed on both sides. But it is said that this differs, because the intent

[1123]

[1124]

(r) *Troughton v. Troughton*, 1 Ves. 86. S. C. 3 Atk. 656. [The latter reference contains the best report of this case, but the decision itself is little relevant to the subject of this treatise.—*Ed.*]

† [The contents of these pages having been previously introduced, it was deemed unnecessary to repeat them here.—*Ed.*]

(F) In *Holmes v. Coghill*, 7 Ves. 499, this distinction was taken at the Rolls between a general power of appointment and absolute property, viz. that a power, unless executed, is not assets for debts, whereas the fee simple of an estate may be made so by bill in equity, and this decision was affirmed on appeal to the Chancellor. 12 Ves. 206.

was to provide for the sister of the plaintiff by this 300*l.* who stood equally in the light of a purchaser for a valuable consideration as the plaintiff; and that therefore, although the father has broke the covenant, yet this shall not be taken from the daughter, who must be put upon the same footing as children, from whom nothing can be taken; but resort must be had to the assets of the person making the settlement; and that is true; but here the appointment to the daughter is a secondary consideration only, it being for the father's benefit, who might have directed it to be paid to a stranger; by whom it could not then be claimed by voluntary appointment from the father, letting this incumbrance remain. It was like the case of a purchaser discovering an incumbrance, who should retain so much for it, as remained in his hands: And this 300*l.* being part of the consideration of the settlement, is in the same light. [1125] The father's other assets must be first applied, and if not sufficient, the plaintiff is entitled to retain the deficiency out of the 300*l.* and the remainder only thereof ought to go to the appointee.

Recital of creation of power essential to its valid execution (c).

Where a power was given to raise money by mortgage, and exceeded in the execution, the Court of Chancery would not relieve the mortgagee, his adversary claiming under a valuable consideration.

(G) It has been suggested, that this case of *Jenkins v. Keymis*, would at the present day be supported in equity, see ante, 73, of this edition, n. (R), and Mr. Sugden's opinion in his *Tre. on Pow.* p. 437, 2d edition. For other cases on the due execution of powers, see *Hiron v. Oliver*, 13 Ves. 114. *Blake v. Marnell*, 2 Ball & Bea. 35. *S. C.* 4 Dow. P. C. 248, and Butl. Co. Litt. 271, b. n. 1. s. vii. 2.

Power to charge when it authorizes power to mortgage.

Whether a mere power to charge an estate with a certain sum, will authorize the appointment of an interest in the land, as for a term of years or otherwise, so as to confer a title to the legal seisin, has not yet been decided; but the general opinion is, that a person having a mere power to charge, cannot mortgage; the most he can do, being to charge the lands with the money, and leave it to a court of equity to enforce the security. The learned author appears to have been of a contrary opinion, ante, p. 72, of this edition, in the text; but the cases there cited in note (u) do not bear out the full extent of his position; and it is probable from the turn and wording of the sentence, that he did not intend to lay down a general rule, that a power to charge an estate with a specific sum will in every instance include a power of raising that sum by mortgage. This is true only of an unlimited power to charge (*Long v. Long*, 5 Ves. 445.) and not of a power to charge with a certain stipulated sum. Another essential distinction is, that though a power to charge with a particular sum will not enable a mortgagor; yet a power to raise a sum generally, will. Thus, where a testator after giving his estate to A. in tail, with remainder to B. in tail, with remainder to C. in fee, gave to his executor full power and authority to raise out of his estate 500*l.* for the use of his next heir, it was held that the executor had sufficient power to sell the lands, which of course included a power to mortgage them. *Wareham v. Brown*, 2 Vern. 163, et vide *Bateman v. Brown*, 1 Atk. 421. So where a sum was charged upon an estate for the benefit of the children "in such manner" as the survivor of husband and wife should appoint, it was held, that the words not only included a power of raising it by mort-

Distinguished from power to raise.

This point occurred in the case of *Jenkins v. Keymis*(s); there K. being tenant for life, remainder to his son C. K. in tail, with remainder over, they, on the marriage of C. K. with B. his first wife, in consideration of the marriage and portion, levied a fine and suffered a recovery to the use of K. the father, remainder to C. K. and the heirs of his body upon B. begotten, the remainder to the heirs of the body of C. K., remainder over, with power for K. by deed in writing to charge all and singular the estates with the payment of 2000*l.* K. and C. K. afterwards, without reciting the power, made a mortgage by lease and release for securing 2000*l.* with interest. Then K. died, and B. also died, and C. K. married a second wife, by whom he had issue a son, and then died. And the money not being paid, the mortgagee brought an ejectment in the Court of Exchequer. And two questions were agitated, first, whether the conveyance by lease and release was a good execution of the power? secondly, if not, whether the settlement, as to the is-

[1126]

(s) Hard. 395. 1 Lev. 150. 1 Ch. Ca. 103.

gage or sale, but also a power of fixing a certain determinate time for raising it. *Green v. Belchier*, 1 Atk. 507. And a power to sell for a particular purpose has been held to imply a power to mortgage, which is a conditional sale. *Mills v. Banks*, 3 P. Wms. 9. If therefore an estate be vested in trustees upon trust to sell, &c. without any express power to mortgage, yet a sale will be authorized; and this is confirmed by the doctrine, that when a trustee for sale becomes also the purchaser, relief in equity is given to the *cestui que trust* on his paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale.

Power of sale includes power to mortgage.

It should also be distinctly remembered, that a power, though exhausted at law, may be but partially executed in equity. Thus where a person having a power of revocation and appointment, mortgages the lands in fee, such mortgage in equity operates only as a partial execution, a mortgage being considered in equity merely as a security for the debt. *Perkins v. Walker*, 1 Vern. 97. *Thorne v. Thorne*, ib. 141. 182. *Lassells v. Lord Cornwallis*, Pre. Ch. 232, *infra*, App. No. xxvi; and whatever may be the form of the instrument, if it be in effect simply a mortgage, it will operate merely as a revocation *pro tanto*. But where there is not only a mortgage, but an ulterior disposition inconsistent with the former, it will operate even in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto*. *Fitzgerald v. Fauconberg*, Fitzg. 207. 6 Bro. P. C. 290. et vide Sug. on Pow. 272, 2d edit. *Thwaytes v. Dye*, 2 Vern. 80. S. C. 3 Ch. Ca. 69. *Keworthy v. Bate*, 6 Ves. 797, and *antea*, 115, of this edition, note (G).

Mortgage but partial execution of power and revocation pro tanto only.

On the subject of powers, it is further observable, that if by marriage settlement an estate be limited to the husband for life, and then to trustees for 300 years to raise portions for younger children, with a power reserved to the husband to charge the premises with a sum of money subject to his life estate; and he afterwards executes his power in favour of a mortgagee; the claim of the mortgagee will be preferred to that of the younger children, for his estate comes in after the life estate of the settlor, to which only the power is subject. *Mosley v. Mosley*, 5 Ves. 249. But in this case, it seems that if the estate were insufficient to answer both charges, it would give room for a very material question, ib. 259. This suggests the propriety of expressing with the greatest clarity, all the charges to which it is intended the power to charge shall be subject.

Priority of estates conferred by power to charge.

The discretion of trustees, having a power to change securities with consent, &c. will not be controuled unless mischievously or ruinously exercised. *De Manneville v. Crompton*, 1 Ves. & Bea. 351.

[1127]

sue by the second marriage, was not voluntary and void against the mortgagee? It was agreed on the first question, that the lease and release was a good execution of the power in point of form, notwithstanding it was by two deeds instead of one, and the son joined in the conveyance; but the question was, if this conveyance of a fee, redeemable upon payment not only of the 2000*l.* but also of interest, was good, or if not good for the interest it was good for the principal? And Sir Matthew Hale and the Court held, that it was not a good execution of the power; because by such means, the estate might be charged with a great sum of money, which would defeat the settlement. And the power was entire, and so ought the execution to be, and it could not be made good in part, and void for the residue *at law*. But Hale said, that perhaps there might be ground for equity to aid the execution as to the 2000*l.* And on the second question, Hale inclined that the consideration of marriage, and a portion, might extend to all the estates in the settlement, and judgment was given for the defendant.

The mortgagee afterwards brought a bill in Chancery, to have the defect in the execution of the power supplied there, but could gain no relief (*t*); it being held there by Bridgman, Chancellor, that the marriage and portion of the first wife extended to the issue of the second, and that the father and son joining in the conveyance, and the power not being recited therein, it could not be intended to be done in execution of the power, but as owners.

Voluntary mortgage void against purchaser, but good if assigned for value (H).

A voluntary mortgage will be void as fraudulent against a purchaser for a valuable consideration, but such mortgage may become a good one, by being assigned for a valuable consideration.

[1128]

Thus, in *Andrew Newport's* case (*u*), which was upon an assignment of a mortgage made by K. in 1659, and after by divers mesne assignments vested in N. as executor of C.; it was

(*t*) 1 Lev. 151, 2. 1 Ch. Rep. 103.

(*u*) *Andrew Newport's case*, Skin. 423. S. C. by the name of *Smartle v. Williams*, 1 Salk. 245. 3 Lev. 387. Holt, 478. Comb. 247, [antea, 660,

of this edition, in the text.] et vide *Prodger v. Langham*, 1 Keb. 486. Sid. 135, pl. 7, [and *Hannam v. Woodford*, Holt, 263. S. C. Skin. 300.—Ed.]

Voluntary mortgage.

(H) As to what shall be a voluntary mortgage, it has been held, that where a father at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee, the mortgage was not a voluntary conveyance without consideration; for that the consideration was in law equal, whether a man pledged his estate for his own debt, or for the debt of another. *Hearne, ex parte*, 1 Buck. B. L. 165, 170. S. C. antea, 212, of this edition, in *notis*, et vide for another case on the subject of a voluntary conveyance connected with a mortgage, *Wrixon v. Colter*, 1 Ridgw. P. C. 295.

objected, first, that it did not appear, that any money was paid upon the original mortgage, and that therefore it was fraudulent, and that it being fraudulent in the creation, though C. paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bond fide*, and for a valuable consideration: *sed non allocatur*: for Holt, Chief Justice, said, that the first mortgage was good between the parties, and being so, where the first mortgagee assigned for a valuable consideration, this was all one, as if the first mortgage had been upon a valuable consideration, for now the second mortgagee stood in his place, and therefore was within the *proviso* of the stat. 27 Eliz. cap. 4. "*that no mortgagee, bond fide, and upon good consideration, shall be impeached by force of this act; but it shall stand in such force as before the act made.*" And he said, if this *proviso* did not extend to this case, to what case would it extend?

In the last-mentioned case, a second objection was also taken to the assignment, upon the ground, that it was not made

Mortgagee may assign without entering on land (1).

(1) This subject, which occupies the eleven succeeding pages, has been amply discussed in a previous note, *antea*, p. 155, of this edition, et seq. where the respective estates of the mortgagor and mortgagee are incidentally considered, but it is there submitted, that their rights are of too complex a nature to admit, without circumlocution, of a specific definition. They partake partly of legal and partly of equitable rights,—partly of one species of tenancy and partly of another. At one time, the mortgagor is a tenant at will, at another a tenant by sufferance; and the mortgagee when in possession is at the same instant both bailiff to the mortgagor in equity, and absolute owner of the estate at law; so that for all useful purposes it seems more correct, as well as more comprehensive, to adopt the suggestion of Mr. J. Buller, and to say, that between the parties there subsists the relation of mortgagor and mortgagee, rather than to designate them by names which are partially descriptive of their powers and situation, and which serve in the end merely to confuse and mislead. Sir Thomas Plumer, M. R. in the late case of *Cholmondeley v. Clinton*, 2 Jac. & Walk. 183, fell in with Mr. J. Buller's observations on this subject, as expressed in a former note, *antea*, p. 156, n. (A), remarking, that the relation between mortgagor and mortgagee was perfectly anomalous, and *sui generis*. It was a contract of a peculiar nature, by which, under certain conditions, the mortgagee became the purchaser of a security and pledge, to hold for his own use and benefit. He acquired a distinct and independent beneficial interest in the estate; he had always a qualified and limited right, and might eventually acquire an absolute and permanent one to take possession, and he was entitled to enforce his right by an adverse suit *in ius* against the mortgagor; all which could never take place between trustee and *cestui que trust*. They had always an identity and unity of interest, and were never opposed in contest to each other. 2 Jac. & Walk. 183. So in *Christopher v. Sparke*, ib. 234, his Honour further said, the argument from there being a tenancy at will, arose from a mere fiction; for there was no actual tenancy, no demise, either express or implied. The mortgagor had not even the rights of a tenant at will; he might be turned out of possession without notice, and was not entitled to the emblements. It was only *quodam modo*, a tenancy at will, as Lord Mansfield said in one of the cases (*Moss v. Gallimore*, 1 Doug. 269, 279). The relation of mortgagor and mortgagee was peculiar; in a court of equity the former was considered as the owner; and that was the nature of the contract between them; the tacit agreement was, that he was to be owner if he paid the money.

Reference to compound nature of estates of mortgagor and mortgagee.

[1129] upon the land, which, as the mortgagor was not a party, and the mortgagee was never in possession, it ought to have been; for though it was admitted, that the first assignment was good, upon the presumption that the mortgagor was in the nature of tenant at will to the mortgagee, and so is possession the possession of the mortgagee, yet, by the assignment, the will was determined, and the mortgagor was not tenant at will to the second assignee. But the objection was held, by Holt and the Court, to be bad; for though the mortgagor was not tenant at will to the second assignee, yet he was not a disseisor, but a tenant at sufferance, and if no disseisin was made, then no right was divested; and no disseisin could be made without a tortious entry, and here there was no new entry; and therefore, though he was tenant at sufferance, yet the mortgagee (his estate not being divested and turned to a right) might assign. And G. Eyre, Justice, said, that when a mortgagee for himself, his executors, administrators, and assigns, covenanted with the mortgagor, that he should enjoy and take the profits till default of payment, the covenant being for his assigns, this would rule the whole case, and he should be presumed tenant at will to all the assigns, as well as to the first mortgagee.

Effect of covenant that mortgagor shall enjoy till default (x).

[1130]
Under this covenant mortgagor may disseise mortgagee by feoffment, and bar him by fine.

But, if any act were done by a mortgagor in possession, under the clause that he shall enjoy until default of payment, which amounted to a disseisin, or divested the estate of the mortgagee, and turned it to a right, the assignee of a mortgage so circumstanced, would gain no estate by his assignment, and would be defeated in any attempt to gain the possession, until such tortious act was done away, and in cases which might be put, absolutely barred. As if a mortgagor in possession under such clause, were to make a disseisin by feoffment, and then levy a fine, followed by five years non-claim; this, I should presume, would be a complete bar to the mortgagee, and all claiming under him (L).

Effect of fine.

(K) See the six learned and ingenious distinctions of Messrs. Morley and Cootes on the effect of this covenant, in their very appropriate notes to Watkins's Elem. Conv. p. 130, et vide 2 Jac. & Walk. 49. Butl. Arg.

(L) Provided no interest were paid on the mortgage during the five years, and even then it would be questionable, as the feoffment would be founded in fraud, and no clear disseisin would be created; see 2 Pres. Con. intro. xxxii. et vide *Doe v. Heller*, 3 T. R. 173, where it was said by Buller, J., that "a mortgagor levying a fine and continuing in possession, cannot bar the mortgagee;" which may be supported under the doctrine of remitter, for supposing the feoffment to create a disseisin, the mortgagor would be in of his old estate, which was a tenancy at will, or some such tenancy to the mortgagee. This is sanctioned by the case next cited, and that of *Holland v. Hutton*, Carth. 415,—the doctrine that a mortgagor could by fine bar the mortgagee, being there considered intolerable.

Where a mortgagee entailed the lands mortgaged by fine, &c. and the mortgagor afterwards sued for redemption, which was decreed him, and he paid

But, as great mischief would ensue, if the notion of disseisins against the intent of parties, by the accidental acts of tenants at will, were encouraged, the courts have set their faces against obstacles of this kind wherever they have occurred.

Thus, in the case of *Powseley v. Blackman* (x), mentioned before in this treatise, and which arose on a special verdict in ejectment, it was stated, that the mortgagee did not enter into the land mortgaged, and that the mortgagor, before any of the days of payment, let it for several years, rendering rent to himself, and died, and the lessee entered by virtue of the said demise, and took the profits, claiming nothing but the term, and at the end of the term surrendered up the lands to the lessor, and that the mortgagee afterwards made his will, and devised the estates in question; and, it being admitted that the mortgagor was only tenant at will or tenant at sufferance to the mortgagee, it became a question, whether his making a lease for years, and the lessee entering and paying the rent, and claiming nothing but the term, and after, in the end of the term, yielding up the possession to the bargainor, should be a disseisin; and if it were a disseisin, whether it was not purged by the re-entry of the mortgagor, and his occupying it *in statu quo prius*, and reducing the inheritance to the mortgagee, so as he was not out of possession, and so his will good; *for on that fact the validity of it depended*. And as to this point, all the justices resolved, that when the mortgagor entered (as it should be conceived, upon the verdict, he did) if he were a disseisor before (as they did not agree that he was, because neither the lessor nor lessee intended to make any disseisin, the lessee claiming but his term) it was only a disseisin in the *lessee for years*; and when the term being expired, the bargainor re-entered, that purged the disseisin, and the mortgagor was in, as he was before, and the inheritance was re-vested in the mortgagee, and his will should be good. And therefore they held, that if tenant at will were ousted by a stranger, and he re-entered, he was tenant at will again to his lessor; for otherwise, it would be a mischievous case in many assurances, where the mortgagor being in, upon condition to

Re-entry of mortgagor after disseisin by stranger, remits him to his ancient character.

[1131]

[1132]

(x) *Powseley v. Blackman*, Cro. Jac. 659. [S. C. antea, 155. 158, of this edition.—Ed.]

the money, but no mention was made of the entail in all the proceedings, and within time the issue of the mortgagee brought ejectment and recovered possession of the premises, yet his mortgagor was relieved, for he paid his money pursuant to the decree, and was in no fault; the Lords Commissioners therefore decreed the issue to convey, and granted a perpetual injunction against the judgment. *Chapman v. Duncomb*, 3 Vern. 142.

pay at the end of the year, and in the interim, that the mortgagee should not meddle, and the mortgagor made a lease for half a year, and after re-entered before the day of payment, that the mortgagor should be a disseisor against his own intent, and the intent of the mortgagee, and that the mortgagee should be said to be out of possession, so as he could not make a bargain and sale at his will. By this means many assurances would be destroyed, which law would not suffer. Wherefore the law accounted, that the mortgagor by his entry was in of his former estate, and that the will of the mortgagor was good.

[1133]
*Tenant at will
 leasing for
 years, disseisor
 at election.*

And in the case of *Blunden v. Baugh* (y), which arose afterwards, it was held, such underlease by lessee at will, would not make a disseisin against the lessor *nolens volens*.

There H. being seised of land in tail, by indenture covenanted, in consideration of marriage between W. his eldest son and heir, and E., to suffer a recovery of certain lands to the use of the said W. and E., and the heirs male of the body of W., with divers remainders over. The marriage took effect, and W. entered by the assent of his father and occupied at will; and afterwards by indenture demised the land to A. and B. for twenty-one years rendering rent. The lessees entered, and were possessed, and they being so possessed, the father and son by indenture covenanted with D, and others (for that the said settlement was not executed, for the performance of the assurances and uses comprised therein) to levy a fine of those lands, amongst other uses, to secure a jointure to E., which fine was levied accordingly. Then W. (the son) died without issue male of his body; afterwards A. (one of the lessees) died; and then B., the other lessee, by indenture inrolled within six months, in consideration of a competent sum of money, bargained and sold the lands to C., then son and heir apparent of H., and to his heirs. Afterwards H. (the father) died, and C. (the son) entered, upon which the jointress entered; and on an ejectment brought by C. to recover the possession, judgment was given in the Common Pleas by three judges against one for the plaintiff the son; but on writ of error in the King's Bench, it was held by three judges against one, that the judgment was erroneous. The main question was, whether by any of these acts there was a disseisin committed to H. *nolens volens*? and if there were a disseisin, who should be the disseisor and tenant to the freehold? And as to the first point, Jones, Berkeley, and Croke, held, that the law would not impute nor construe it to be a disseisin, unless at the

[1134]

election of H. when none of the parties intended it to be a disseisin, nor to oust him of the possession; for as Coke, Littleton (153), defined it, *a disseisin was where one entered intending to usurp the possession, and to oust another of his freehold*; therefore the court were to enquire, *quo animo hoc fecerit*, why he entered and intruded? and it was at the election of him to whom the wrong was done, if he would allow the wrong-doer to be a disseisor, or himself out of possession. *Tenant at will*, [1135] they said, was at the will of both parties, and the will should not be determined by every act. And they cited and approved the case of *Powseley v. Blackman* (z); and they said, that it should not be intended, that the son intended to disseise his father, but that the lease was made by the assent of the father; also the party to whom the lease was made, did not claim any freehold, but to have the lease only, and to pay his rent, and paid the rent accordingly; so there was no intent in any of the parties to make a disseisin; then the law should not construe it to be a disseisin *partibus invitis*. And that hereby it followed, that the freehold remained in H., until the fine levied by him and his son W., and so the uses thereof were well raised, and the jointure well assured. But they held farther, that if there were a disseisin committed by these acts, W., who made the lease, was the disseisor and tenant, *quo ad* all persons, but the first lessor, but *quo ad* the first lessor, they both were disseisors; for when tenant at will took upon him to make a lease, which was a greater estate than he might make, that act was a *disseisin*, and by this lease for years made, and the lessees entering and paying the rent unto him, and he accepting thereof, he was in as lessee, and the lessor was the disseisor, and had the reversion expectant upon this lease; and this lease betwixt them, was an interest derived out of the inheritance, gained by this disseisin; for if a lessee for years made a feoffment, although it were a disseisin to the lessor, yet it was a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee was in the *per*, and warranty might be annexed to such an estate upon which he might vouch. And if such lessee for years or at will, made a gift in tail, or a lease for life, that created a good lease, or a good gift in tail amongst themselves, and all others besides the first lessor, and as to him they were both disseisors. Then when lessee for years entered according to the lease, and paid his rent the freehold betwixt them should be in W., who made the lease, and not in the lessee; and then the fine levied by H., and W. his

But his lease entering, creates immutable disseisin.

[1136]

(z) *Supra*, 1037, of this edition.

son, conveyed well the freehold, and the uses were well raised upon this fine, and the jointure well settled. And on these grounds they held, that the judgment ought to be reversed, and the majority of the judges agreeing with them, it was reversed accordingly.

Ejectment (though it complains of ouster) no evidence of mortgagor's election to be out of possession.

[1137]

In *Andrew Newport's case*, before mentioned (a), it was contended, that though the mortgagee was not out of possession by the assignment, yet he might be out of possession in that case at his election, and that he had made his election there to be out of possession, for he had brought an *ejectione firmae*, and by it admitted himself to be out of possession, for the ejectment complained of a tortious entry, and an ouster, and this being a matter of law, he was estopped to alledge the contrary, *sed non allocatur*; for *per curiam*, an ejectment, as it was in common practice, was but a feigned action, to which the lessor of the plaintiff, who was the principal person, was not a party; and not being a party, this could not be given in evidence as an estoppel against him; and therefore he could not maintain an action for the mean profits, without an actual entry, but the lessee might; and it had been ruled, that the bringing of an ejectment, was not such an entry or claim, which should avoid a fine and non-claim for five years.

Assignment of mortgage must be made on land, when.

[1138]

But, if the mortgagee enter upon the mortgagor, and he re-enter, this will be a determination of the will (b), and the re-entry of the mortgagor a merely tortious entry, in which case an assignment by the mortgagee without a re-entry would not be valid. So, if the mortgagee or his assignee, by his manner of pleading, were to admit a disseisin, the assignment must be made on the land, or it would be bad.

Mortgage of brew-house, with appurtenances will not carry utensils.

A question arose in the case of a bankruptcy (c), between the assignees of a bankrupt and a mortgagee of the brew-house, whether the fixtures passed by the mortgage on the following facts: In 1745, R. sold the utensils of a brew-house, and let a lease of the brew-house, to B.; and in 1746, mortgaged his brew-house, with the appurtenances, &c. to I. S. B., after this, sold his lease and utensils to W., who, for a sum of money in 1748, mortgaged the whole to R.; afterwards R. became a bankrupt, and his effects were vested in Q., as assignee under

(a) *Supra*, 1127-9. *Skin.* 423. 1 *Balk.* 245. 3 *Lev.* 387. *Holt*, 478. *Comb.* 245.

(b) *Per Holt*, in *Smartle v. Williams*, as reported, *Ca. temp. Holt*, 478. [*S. C.* *antea*, 163, of this edition, text.—*Ed.*]

(c) *Quincy, Ex parte*, 1 *Atk.* 477. [This case has been mentioned, *antea*, 39, of this edition, and some of the late determinations subjoined in the notes (Z) and (D), p. 40, *ib.* et vide *Dale, Ex parte*, 1 *Buck. B. C.* 365.—*Ed.*]

the commission, who, as standing in the place of the bankrupt, was entitled to the mortgage from W., and by virtue thereof claimed the utensils.

I. S., the mortgagee of the brew-house, in 1749, insisted, [1139] that the fixtures passed by his mortgage (d); a petition was therefore preferred to the Chancellor for a delivery of all the utensils.

Et per curiam, this is a case for a mere action at law (e), and might be determined by action of *trover* or *detinue*. I am inclined to think, it was not the intent of R. to mortgage the utensils; for there is some description generally of things in a brew-house. The manner of describing the parcels, shews, that he did not at all mean to mortgage the utensils, for the word *appurtenances* seems to intend only things belonging to out-houses.

The rule as to fixtures, as between an heir and executor, is another thing (f). The freehold descending on the heir, the executor cannot enter to take away fixtures, without being a trespasser. But there is another rule between landlord and tenant; during the term a tenant may take away chimney-pieces and even wainscot, which is a very strong case, but not after the term; if he did, he would be a trespasser. A mortgage, it is said, is a purchase, but then it is a redeemable one. How does it stand between a purchaser and a vendor? If a man sells a house, where there is a copper, or a brew-house, where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass. But then another question will arise; what action can you bring? For where things are fixed to the freehold, an action of *trover* will not lie for them. Several sort of things are fixed to the freehold, and yet may be taken away, as beds fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt, but they may be removed. The difficulty with me is, the possession of the mortgagor; but that is cleared up, because it was the express agreement between the parties, that the mortgagor should not be prevented from coming on the brew-house. I apprehend the sale of the utensils was a defeasible sale, to revert to the *mortgagor*, the bankrupt, at the end of the term; [1140]

(d) *Quincy, Ex parte*, 1 Atk. 477.

(e) *Ibid.*

(f) *Ibid.*

(M) As to what shall be fixtures, see *Davis v. Jones*, 2 Barn. & Ald. 165. *Elwes v. Maw*, 3 East, 38, and *Buckland v. Butterfield*, 2 Brod. & Bing. 54.

and if so, there is an equity in the grantor, and therefore, as to the mortgagee, a possession in the bankrupt. Let it stand over to the next day of petitions, and let the mortgagee produce all deeds and writings, and the assignee at his expence to take copies, if he pleases.

[1141]
Release of equity of redemption, without consideration pending suit, set aside.

Upon a bill in equity the case was, that the defendant W. had mortgaged lands to the other defendant, and then articted with the plaintiff H. to sell him the said land free from all incumbrances for 250*l.*, of which 50*l.* were actually paid to the defendant W. (g). Afterwards W. released to R. the condition and power of redemption, and pending the same bill, released to the said R., the mortgagee, all his right in and to the lands; but no money or other valuable consideration appeared to have been paid or given for either of these releases; and the court held, that neither of them ought to obstruct the conveyance to H. by W.; because they were given without any valuable consideration, and one of them pending this suit; and that both these releases ought to be set aside, as to the plaintiff.

Whether on bill of discovery defendant can be decreed to convey.

But in the last case the court doubted (h), whether, upon the bill as framed, the defendant R. could be compelled to convey his estate to the plaintiff, upon the payment of what was due upon the mortgage and interest; because the bill prayed only a discovery against R., and that W. should make the assurance and to be relieved in the premises, and no conveyance from R. was required.

[1142]

Joint mortgagees purchasing equity of redemption generally, hold it as they did mortgage (N).

Where an equity of redemption is purchased in by several persons interested in a mortgage, it shall enure to the mortgagees in the same manner as they hold the mortgage.

And, therefore, where a man having a mortgage for years, by his will (i), devised all his personal estate, of what nature soever, to his executors, in trust for the payment of his debts, and afterwards devised the residue and overplus of his said personal estate to his two daughters, *equally to be divided between them*, and died; and, the debts being satisfied, the daughters contracted with the mortgagor for the purchase of the equity of

(g) *Hill v. Worsley*, Hard. 320.

(i) *Edwards v. Fashion*, Pre. Ch.

(h) *Ib.* sed vide *Brent v. Bett*, 332.

1 Vern. 69. S. C. infra, 1145.

(N) That is, as they hold the land, and not as they are entitled to the money, for supposing them to be tenants in common of the land, and joint tenants of the money, the equity of redemption would enure to them as tenants in common, and so vice versa, and therefore it is perhaps too generally laid down, ante, p. 672, of this edit. n. (N), that if two mortgagees purchase the equity of redemption, they will in every instance hold the land as tenants in common.

redemption, and inheritance of the mortgaged estates to them and their heirs, and articles were executed on both sides accordingly; and a decree obtained for a specific execution. One of the daughters, after the death of the other, claimed the whole inheritance by survivorship, as a joint-tenancy; and the question on a bill filed by the devisee of the deceased daughter was, whether this purchase of the inheritance were a joint-tenancy, or a tenancy in common? And it was decreed to be a tenancy in common; for so was the mortgage devised to the two daughters, whereon this purchase of the equity of redemption and inheritance was founded; and therefore they, having several and distinct interests, as tenants in common of the mortgage, and paying an equal proportion for the purchase of the equity of redemption and inheritance, should have that in the same manner.

[1143]

Where an executor bought an equity of redemption of an estate, on which a testator had a mortgage, it was considered as assets, and liable to legacies (j).

Equity of redemption purchased by mortgaged's executor, assets.

[1144]
[1145]

Where one devises lands mortgaged to one for life, remainder over, the money, if the lands are redeemed, shall be apportioned.

Mortgage money paid in, tenant for life entitled to one third, and remainder-man to residue (o).

And, if the claims of the parties are before the court, it will adjust them, without a specific bill for that purpose.

Thus (l), where one having mortgaged unto B., part of his copyhold lands in fee, being customary lands of inheritance, B. surrendered them to the use of his will, and devised them to his wife for life, remainder to C. in fee, and made his wife executrix, a bill being pending to redeem, to which tenant for life and the remainder-man were defendants; it was prayed on behalf of C., that if the mortgagor redeemed, C. might have a proportionable share of the redemption money, according to the value of the estate he had in the land. And the matter, in fact, appearing to be so upon the pleadings, although C. had no cross bill for the purpose, nor had so much as insisted upon

[1146]

(j) *Ryall v. Ryall*, 1 Atk. 59.(l) *Brent v. Best*, 1 Vern. 70.

(O) This rule was propounded when a similar one prevailed with respect to contribution. See antea, 312, of this edition, in the text. But the latter doctrine having been exploded, see note (M), ib., it is fair to presume that the rule in the text, which is in truth the same rule, but conversely applied, would follow the like fate; consequently it is probable that where there is a tenant for life with remainders over, of money due on mortgage, and the debt is discharged, the court would decree the particular tenant to be entitled to the interest for his life, and at his death, that the principal should devolve on the remainder-man; to effect which the money may be laid out in land, or invested in the funds in trust for the particular tenant, for life, and after his death to such other uses as the case may require.

Tenant for life now entitled to interest only, and money would probably be invested to give him interest for life.

it in his answer, it was ordered by the Lord Chancellor, that C. should have his proportionable share of the redemption-money. And the ordinary rule of the court, in such case, was said to be, that one-third of the money should be paid to the tenant for life, and the two-thirds residue to the remainderman.

Mortgagor appoints mortgagee his executor; land exonerated under circumstances.

Where one mortgaged his estate to F. (m), who paid no money in consideration of the mortgage, but gave the mortgagor a bond for 130*l.*, the mortgagor afterwards made the mortgagee his executor and died. Then the heir of the mortgagor, brought his bill to have the real estate exonerated, considering this bond as assets in the hands of the defendant. And so it was held to be; for notwithstanding, at common law, the making an obligor executor, extinguishes his debt, yet, in this case, the bond shall be considered as assets in the hands of the defendant the executor, and applied, for the payment of funeral expences and legacies, to the exoneration of the real estate in favour of the heir.

[1147]
Covenant to levy fine next Easter Term, to certain uses. Fine levied three years after, may be to other uses.

Where a mortgage is made by baron and feme, and there is a covenant to levy a fine, and the fine is covenanted to be levied of a certain term, if the fine be not levied by the time in which it is covenanted to be levied, it seems that it will not strengthen the deed of mortgage, if any other uses be declared by a subsequent deed.

This question occurred in the case of *Fleetwood v. Templeman* (n). There, a man and his wife, in the year 1692, made a mortgage of the wife's estate of 40*l. per annum*, for the sum of 789*l.*, and covenanted in the mortgage deed to levy a fine of the estate in the *Easter Term* following. The fine was not levied till *Trinity Term*, in the year 1695; then, in consideration of 10*l.* more, they joined in a conveyance of the equity of redemption to an assignee of the mortgagee, and covenanted, that the fine theretofore levied, should be to the uses of this deed; afterwards the husband being dead, the wife, the estate being increased in value, filed her bill to redeem; and one ground, on which she founded her claim, being the invalidity of the latter deed to declare the uses of the fine, Lord Hardwicke said, that he was inclined to think, as the covenant to levy the fine was confined to *one* particular term, and was not levied till the next term after, that the husband and wife might, by the deed in 1695, covenant that the fine theretofore levied should

[1148]

(m) *Fox v. Fox*, 1 Atk. 463.

(n) 2 Atk. 80. S. C. Barn. Ch. Rep.

187, et antea, 706, of this edition, n. (D).—Ed.]

be to the use of the latter deed, and the former deed in 1692, might be laid out of the case, as the covenant under it, for levying the fine in *Easter Term*, was not strictly pursued. But it is said in *Barnardiston's Reports*, that his Lordship said, he would not determine the case upon this point only, but upon the whole circumstances, which he did accordingly against the mortgagor.

The *cestui que trust* of things mortgaged, is answerable, if his trustee produce them not on application to redeem; and that as well where he is constituted trustee by inference of law, as where he is appointed by the positive act of the party.

Cestui que trust
answerable for
pledge, if his
trustee produce
it not, on appli-
cation to re-
deem.

Thus, where P. (o), whose executor the plaintiff was, being possessed of certain pieces of hangings, put them into the hands of A., an upholsterer, to sell for him; but having occasion for money, desired B., who was a scrivener, to lend him 500*l.* on the hangings, which he did, having previously enquired of A. as to their value. And afterwards P. borrowed on the hangings 100*l.* more, and gave a judgment also for the debt with interest, the hangings being still in A.'s hands. The money lent belonged to C., for whom B. dealt as a scrivener, but neither P. nor his executor knew that, nor did C. appear therein, though the securities were in his name. A. sold the hangings privately at an under value. B. and C. pretended ignorance of the sale; but A., after the sale, desired the plaintiff, the executor of P., to sell them, who refused so to do, unless he might first see them. The plaintiff paid the money borrowed and interest, and the securities were thereupon delivered up to him by B., in whose hands they had always been, but the hangings being sold, could not be had; and B. said, he had nothing to do with A. Hereupon the plaintiff, the executor of the mortgagor, exhibited his bill in Chancery against A., B., and C., to have the hangings or the value in money. And it was decreed, that the defendants should pay the money. Then B. and C. petitioned for a re-hearing, and that the decree might be explained as to them only; for that there was no reason to charge them, as they did not put the hangings into A.'s hands, but they were placed in A.'s hands by P., with power to sell them, and therefore they (B. and C.) ought not to be charged by A.'s default. But the Lord Chancellor, on long debate, affirmed his former decree; for by the sale and mortgage, P. divested his property, and the goods became B.'s, and A. became trustee for B., and B. must answer for his trustee A., who

[1149]

[1150]

sold them after the mortgage. And though B. pretended to act as a scrivener only, and as an agent to lend B. money, they were to be looked on as one person as to the plaintiff, for the scrivener keeping the securities for B., B. trusted him thereby with all, and he had power to dispose of the monies, and he undertook the same by keeping the securities, and should be answerable as B.

[1151]
Of pleading a
mortgage (r).

Where a defendant pleads a mortgage (r), he ought to shew that the mortgagor being, or pretending to be, seised in fee of the premises, did make such mortgage, &c. otherwise the person undertaking to mortgage, may be a mere stranger, and have no interest in the premises, though he takes upon him to mortgage them.

Counterpart
evidence.

Where the original deed of mortgage was lost, it was decreed, that the counterpart should be allowed as an *original*, and admitted as such at any trial, &c. (s).

Costs due to
baron and feme
on mortgagee's
plea being over-
ruled, survive
to wife (a).

The plaintiff and his wife brought their bill to redeem a mortgage of the wife's estate (t); the defendant put in a plea to the bill, which was over-ruled, for which 5*l.* costs was of course given to the plaintiffs; the defendant brought a cross bill to foreclose the wife, who being the surviving plaintiff in the

[1152]

(r) 3 P. Wms. 281.

(s) *Briscoe v. Denbigh*, Finch, 237.

(t) *Coppin v. ———*, 2 P. Wms.

497.

Pleading.

(P) Possession under a decree of foreclosure inrolled is a good plea, MS. 15 Vin. Abr. 478. (C. a.) So it is sufficient to say "*obd' p'ced' p'gratum fuit p'ced' A. B. &c.*" without saying how it was mortgaged, ib. In *Baily v. Taylor*, the defendant pleaded in bar, that the close mentioned in the condition of the bond was not mortgaged; the plaintiff replied, that it was; and thereupon issue was joined, and found for the plaintiff. The defendant then moved in arrest of judgment, that the replication was not good, for that it should have alleged that the mortgage was not redeemed, as well as that the close was mortgaged. But three of the Judges against one, held, that the replication was in direct answer to the plea, and therefore, that it was good, upon which judgment was given for the plaintiff, Yelv. 25. In debt, the plaintiff declared that the defendant bound himself, his heirs, executors, and administrators, to pay the mortgage money; upon *non est factum* pleaded, it appeared that the defendant bound only himself, his executors and administrators; this variance was held immaterial, for, per Bailey, J. the judgment would bind his heirs, whether he bound them by deed or not. *Hamborough v. Wilkie*, 4 Man. & S. 474, n.

Right to costs
dies with per-
son.

(Q) The general rule is, that costs decreed to a plaintiff or defendant fall to the ground by the death of the party before they are taxed, but when taxed, they become a judgment debt, and if the party to whom they are given, dies, they go to his representative, who may revive for costs only. Sel. Ca. Ch. 21. *Hall v. Smith*, 1 Bro. C. C. 438. S. C. 2 Dick. 649. *Edgill v. Brown*, 1 Dick. 62. *Lowton v. Mayor of Colchester*, 2 Meriv. 116. and *White v. Hayward*, 2 Ves. 462. S. C. 3 Ves. 197, cited; where it was held, that if a defendant be in execution for costs, and the plaintiff die, an order may be obtained, that his representative shall revive within a certain time, and if he does not, that the defendant be discharged. To these rules the case in the text may be considered an exception.

original cause, moved the court, that proceedings should stay in the cross cause, until the plaintiff, who was defendant in the original cause, had paid the 5*l.* costs due upon over-ruling the plea. It was objected on one side, that these costs must be intended to have been laid out by the husband in the original cause, and that, consequently, upon his death the same were lost. On the other side, it was insisted, that this original suit was in right of the wife, who being entitled to the equity of redemption, the husband joined therein only for conformity; and that the suit was not abated by the death of the husband, the order for costs being in nature of a joint judgment, which must survive to the wife; and that the sum for costs was certain by the course of the court, though not expressed in the order. The Lord Chancellor for some time doubted, but afterwards taking it to be as a joint judgment for a sum certain, determined that it did survive to the wife; whereupon it was ordered, that proceedings should stay in the cross cause, until the defendant in the original cause should pay the 5*l.* costs for over-ruling his plea (R).

[1153]

(R) The following miscellaneous observations may be referred to this chapter:—

Where by deed dated 26th of August, 1795, C. covenanted to pay J. 120*l.* on the death of one B. (who was dead), and J. assigned this sum of 120*l.* due on the covenant to N., by way of mortgage to secure the payment of 60*l.* and interest, with a common proviso; it was contended that by this assignment the whole right and interest in the 120*l.* became vested in N., the condition being broken, and therefore that an assignment of this sum to Lane the plaintiff, under the 41 Geo. 3. c. 70. (the then insolvent act) was inoperative. It was held that the plaintiff might recover the surplus of the money due beyond the mortgage. *Lane v. Chandler*, 3 Smith, 77.

Mortgage of money due on covenant.

An agreement that the mortgagor shall be at liberty to pay off the money advanced by instalments, in which case a proportion of the land to be discharged, has been held to be a good agreement. *Vaughan v. Morgan*, Finch, 138.

Instalments.

Where A. gave a cash note to C. for 5000*l.* and mortgaged his estate to B. as a collateral security for the money, and C. kept the note by him, and B. became bankrupt, on a bill brought by A. for relief against the mortgage, because C. neglected to turn the note into money: it was held that A.'s estate was liable to pay the principal and interest due on the mortgage. *Lake v. Mason*, 4 Bro. P. C. 553.

Collateral security.

If a mortgagee of goods, after the mortgage has become absolute, receive instructions from the mortgagor to insure them, he must, if he intends to refuse, give notice to the mortgagor, that he may apply elsewhere, otherwise he will be taken to have assented. *Smith v. Lancelas*, 2 T. R. 187.

Insurance.

A covenant in a mortgage deed for re-payment of the money, is a contract within the 3 Jac. 1. c. 8, so that a mortgagor cannot take out a writ of error on a judgment had thereon, without first perfecting bail, according to that statute. *Buckney v. Metham*, 3 Taunt. 383.

Writ of error.

The court will require a plaintiff (proceeding against a defendant for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on such agreement and other debts; and also for an assignment of a bond alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand,) to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both at one and the

Plaintiff required to elect.

same time. The plaintiffs having elected to pray an assignment of the bond, a reference to the deputy remembrancer was ordered, to ascertain the fact of payment of the debt, and if paid, the nature of it. *Jackson v. Radford*, 4 Price, 274.

Mortgage of Chelsea pension, void.

By the 28 Geo. 2. c. 1, it is enacted, that all contracts whereby a pension of the Chelsea hospital shall be mortgaged, shall be void. This humane regulation was introduced by Lord Chatham, while paymaster-general of the forces, and will ever remain a standing monument of his humanity. "Prior to this regulation," says Dr. Smollett, "the poor disabled veterans who enjoyed a pension of the Chelsea hospital, were so iniquitously oppressed by a set of miscreants, who supplied them with money per advance at the most exorbitant rates of usury, that many of them, with their families, were in danger of starving; and the intention of government in granting such a comfortable subsistence was, in a great measure, defeated." Smoll. Con. of Hume, c. ix. vol. 14. Ster. edit. 178.

Power of attorney.

If, on a mortgage transaction, the mortgagor gives a power of attorney to effectuate any part of the security, such power, contrary to powers of attorney in general, is irrevocable by the act of the party. *Waleh v. Whitcomb*, 2 Esp. 565. But by the act of God it may be revoked, as in the instance of the mortgagor's death. 2 Meriv. 514.

Mortgagor pays money, but receives it again, — mortgage discharged.

As to what shall be a good payment and discharge of mortgage money, it is observable that where A. indebted by mortgage to B. in 100*l.* paid the money, and B. ordered his servant to put it into his closet, who did so, and then A. demanded his writings, which B. not delivering, A. required his 100*l.* again, which the servant, by B.'s order, re-delivered to A., and A. took and carried it away; it was resolved, that this was a good payment and discharge of the mortgage, and though A. demanded it again as his own money, yet it should not avoid that which was absolutely paid, but the mortgage remained absolutely discharged, and the money was the plaintiffs; but inasmuch as it was not delivered to A. on any good consideration: he received it as B.'s money, and was accountable to B. for it. *Hewer v. Bartholomew*, Cro. Ellis. 3. 614.

CAP. XXIII.

OF EQUITABLE MORTGAGES; VENDOR'S AND SO THE
CITOR'S LIEN; MORTGAGES OF PUBLIC STOCK, COPY-
HOLD ESTATES, COLONIAL PROPERTY, AND SHIPS;
SECURITIES BY STATUTES MERCHANT AND STAPLE;
RECOGNIZANCES; CROWN DEBTS; LEASE AND LOAN;
BANKRUPTCY; EJECTMENT; ELECTION; AND MER-
GER.

NUMEROUS observations remain to be made on various subjects connected with mortgage transactions, which it is proposed to arrange under the following sections:—I. Equitable mortgages. II. Vendor's lien for purchase-money unpaid. III. Solicitor's lien, and mortgages between attorney and client. IV. Mortgages of public stock. V. Copyhold mortgages. VI. Mortgages of colonial property. VII. Mortgages of ships. VIII. Securities by statute merchant, statute staple, and recognizance. IX. Lien of Crown debts. X. Lease and loan. XI. Cases in bankruptcy. XII. Rules as to ejectment. XIII. Doctrine of election; and, XIV. Merger of charges.

SECTION I.

OF EQUITABLE MORTGAGES.

IN treating this subject, it is designed to consider, first, equitable mortgages by written, implied, and parol agreements; and, second, equitable mortgages by deposit of title deeds.

FIRST. By an *express written agreement* to make a mortgage, a lien is created on the land in equity, on the principle, that what has been agreed to be performed shall be actually performed. *Hankey v. Vernon*, 2 Cox, 12. Thus, where J. S. being about to mortgage an estate, upon which his younger brothers and sisters had charges, procured their concurrence in the conveyance, and in an acknowledgment of the receipt of their portions, gave them an undertaking, that he would grant them a subsequent mortgage and enter into no prior security; and he afterwards made a subsequent mortgage to the plaintiff, for money lent previously on bond, and a fresh sum advanced: it was held, that the claims of the younger children should have priority in equity, and should be preferred to the plaintiff's legal mortgage. *Becket v. Cordley*, 1 Bro. C. C. 352.

Express agreement to make mortgage, creates equitable lien.

So a covenant to set apart and pay annual profits of land, is in equity a lien on the land against the covenantor and claimants under him, with notice. *Legard v. Hodges*, 1 Ves. 477.

An agreement to make a mortgage may be collected from the recital in a defective deed, of the intention of the parties to charge the land with the sum borrowed, or from the covenant for further assurance usually inserted in mortgage deeds, as in *Wills, Ex parte*, 2 Cox, 233, (S. C. but short and unintelligible, 1 Ves. jun. 162, et antea, 523, of this edit.) where a bankrupt having mortgaged an estate for 400*l.*, afterwards borrowed a sum of money of the petitioner, and by way of security made a lease of the mortgaged premises to another person, and assigned the rent reserved on that lease to the petitioner, but did not convey to him the interest in the land. The assignees objected to the validity of this lease, contending that it was void, as being made by a mortgagor without the concurrence of his mortgagee. Lord Thurlow admitted the lease to be void as against the mortgagee, but declared it not so as against the lessor; and as to the assignment of the rent, though it was a very unusual mode of conveyance, yet as it recited the in-

Agreement inferred from recital or covenant for further assurance.

*Mortgage of
Chelsea pen-
sion, void.*

same time. The
bond, a reference
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v. *Radford*, 2

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land, and decreed

2 Vern. 151. So where a debtor made an absolute conveyance to his creditor without any express consideration, it was presumed to be a mortgage and redeemable on payment of the money due. *Card v. Jaffray*, 2 Sch. & Lef. 374. It is by an implied agreement that the court raises an equity between debtor and creditor, when the former deposits deeds with the latter without verbally communicating the intent of such deposit, vide *infra*.

*Parol agree-
ment to mort-
gage, not bind-
ing.*

With respect to parol agreements for a mortgage, the statute of frauds, (29 Car. 2. c. 3.) enacts, that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorised. The consequence is, that a parol agreement to execute a mortgage will not be binding on the party to be charged therewith; and though we shall presently observe that a deposit of deeds with a parol stipulation to perfect a legal security, will be sufficient to charge the party with an agreement to execute a valid mortgage, yet we shall also perceive, that a deposit alone, without any such parol contract will of itself be evidence of an agreement executed for a mortgage of the estate. It is, therefore, not so much on the ground of a parol understanding between the parties, as upon the equitable effect of the deposit that a lien on the land is created. And it is acknowledged on all hands, that the deposit itself, when made for the purposes of security and not *diverso intuitu*, is equivalent to an agreement in writing, or at least to such an agreement as will support the creditor's bill in equity for a conveyance of the legal estate. To put a case of pure oral contract—if A. agree with B. in presence of their common solicitor, to make a mortgage for a sum which B. advances, or for a debt due from A. to B., and A. delivers to the solicitor title deeds to assist him in preparing the mortgage, which is prepared accordingly, yet A. may resist specific performance of his contract, and B. will have no relief in equity. *Cooke v. Tombs*, 3 Anst. 420; and *Case v. Waterhouse*, Pre. Ch. 29. For a full view of the learning on parol agreements, the reader should consult the third chapter of Sug. Ven. & P. p. 61, 5th edit.

*Antiquity and
progress of doc-
trine of equit-
able mortgages
by deposit.*

SECOND. The case of *Russell v. Russell*, presently mentioned, is generally supposed to be the first which established the doctrine of equitable mortgages by deposit of title deeds; see Tho. Co. Litt. 36, n. (2); but that of *Fitzjames v. Fitzjames*, Finch, 10, (25 Car. 2. 1673.) bears the stamp of greater antiquity. It speaks of the rule in familiar terms, decreeing without hesitation, that the benefit of the lease and trust deed ought to go to the plaintiff, upon payment of 700*l.* to the defendant, for which the said deed remained with her as a security; and that the said lease should, after payment of the money, attend the inheritance, and be left with the Register till the 700*l.* was paid, and then to be delivered to the plaintiff, and that the

the money borrowed, and these
covenant in equity amounted to
herefore, the case was within the
decision is said to have been made
Dickens, 2d vol. 759. But by
vol. 595, it appears that the plain-
not merely by an equitable title.
of a larger estate, without speci-
subsequent incumbrancers with no-
a part sufficient for that purpose.
Sch. & Lef. 381. But an agreement
out any actual demand, will not of
id. *Williams v. Lucas*, 2 Cox, 160.
specific lien against other creditors of
3 Ves. 582. As to priority acquired
ec. div. 2. sub. div. 4.

In most instances, he implied from
and creditor, lender and borrower.
it's uncle, and for his security took
judgment, in ejectment for three
twenty years, it was held, by the Lords
ms, to be a defective security, never-
ity as a good agreement to charge the
against the heir. *Dale v. Smithwick*,

Master should direct and settle the assignment. Hence, it may be inferred, that the doctrine of equitable mortgages, is a very ancient head of equity. Before the decisions on this subject, the statute of frauds; 29 Car. 2. c. 3. s. 3. said, that no estate or interest in land, either of freehold or for a term of years, should be granted or surrendered, unless by deed or note in writing, signed by the party or their agents; or by operation of law. The object of the statute was to prevent the admission of parol evidence and the occurrence of such contradictory statements as leave the mind of the Judge in perfect doubt as to what the nature of the alleged agreement really is. Shortly after the statute, the court would not allow (even if all the parties were consistent in their statement,) a parol contract to be established; because if they did so in a clear case, they must have done so in a case less clear, till at length agreements would have depended on a mere question of swearing. Prior to the cases on equitable mortgage by deposit of muniments of title, the party having the deeds had a right to say he had an interest in the deeds, but he was not allowed to contend that he had any interest in the land. A person with such an interest might have said, "as you cannot part with your estate without paying me, I will, by means of that embarrassment, work out my own satisfaction;" per Lord Eldon, in *Whitbread, Ex parte*, 1 Rose, 300. S. C. 19 Ves. 212. The surprise then was, how the court could admit the deposit of deeds to be evidence of an agreement for an interest in the estate, in the teeth of judicial decisions, that a lien on deeds might exist without giving any right at law to the land. There is a remarkable case (*Head v. Egerton*, 3 P. Wms. 279,) where a prior incumbrancer was held to have the legal interest in the estate; but the court would not take away the deeds from a subsequent incumbrancer, and allowed him all the benefit he could derive from those deeds, nevertheless giving him no interest in the estate. *Kensington, Ex parte*, 2 Ved. & Bea. 83. The doctrine of equitable mortgages by deposit, is now, however, permanently established, as the succeeding cases will fully evince.

Lien on deeds, without lien on land.

After reviewing the elementary principles of this species of mortgage, it may be useful to inquire, *First*. What will amount to a sufficient delivery; *Second*. Whether a delivery of copies of court roll will create any lien; *Third*. Whether an equitable deposit will cover future advances; *Fourth*. What priority is acquired by an equitable mortgage. 1^o. As it regards the crown, and 2^o. As it relates to the subject; *Fifth*. Whether an equitable mortgage may be assigned; *Sixth*. How the bankruptcy of the mortgagor will affect the security; and *Lastly*. Whether an equitable mortgagee praying a sale will be liable to costs.

Plan of enquiry.

The leading decision on this head of equity, is that of *Russell v. Russell*, 1 Bro. C. C. 269, where A. pledged a lease to the plaintiff for money lent, and other monies then due, and afterwards became bankrupt; upon which the pledgee brought his bill for a sale of the leasehold estate, alleging, that the bankrupt at the time of the deposit, promised to execute an assignment when required; and that the assignees had sold the premises to some of the other defendants by auction, after notice to all parties of the plaintiff's claim. The case came on before the Lords Commissioners Loughborough and Ashhurst; the former of whom said, that as it was the case of a delivery of the title to the plaintiff for a valuable consideration, the court had nothing to do but to supply the legal informalities; in all these cases the contract was not to be performed, but was executed. Mr. J. Ashhurst, thought it was open to explanation, and suggested the propriety of directing an issue, to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt, which was directed accordingly. Upon the trial, the jury found that the lease was deposited as a security. The reporter adds, that he had been informed, that this cause came on afterwards, before Lord Thurlow, on the equity reserved, when his Lordship ordered the lease to be sold and the plaintiff paid his money; see accordingly, 9 Ves. 117.

Deposit of deeds, a contract executed.

Whether it be for security, triable by jury.

This decision has met with universal disapprobation, because (according to the language of my Lord Eldon) it was a virtual repeal of the statute of frauds; nevertheless, it has been always acted on, and each succeeding case has added stability to a decree which it has previously pronounced to be settled on a spurious principle. The virulent tone of censure unremittently passed on the doctrine under consideration, throughout the numerous cases on this subject, cannot but excite surprise (especially when connected with the consequent diminution of stamp duties) that it

Doctrine not to be extended.

has not yet attracted the notice of the legislature. Lord Eldon has expressed his determination not to extend the equity beyond its present limits, though, as far as it has gone, he has acknowledged himself bound by the existing authorities. In one case he declared, that the statute was not to be repealed by him farther than it had been hitherto repealed by his predecessors, to whose authority he submitted. *Whitbread, Ex parte*, 1 Rose, 300. S. C. 19 Ves. 212. In another case, the same noble Lord lamented the decision in *Russell v. Russell*, because it led to a discussion on the truth and probability of evidence, which it was the very object of the statute of frauds entirely to exclude. *Haigh, Ex parte*, 11 Ves. 403. In *Finden, Ex parte*, Lord Eldon further expressed his disapprobation of the doctrine, and declared, that a deposit of deeds should not be considered as a mortgage, except in a clear case, and refused so to treat it in that instance. The circumstances, however, are not stated on the report. 11 Ves. 404, n. (a).

Lien created by deposit, without word passing.

The deposit of title deeds is evidence of an agreement executed for a mortgage, and an equitable title to a mortgage is, in the Court of Chancery, as good as a legal title in a court of law. *Wright, Ex parte*, 19 Ves. 258. A mere deposit without a single word passing, will amount to an equitable lien on the land, if it be connected with a transaction of lending and borrowing, or be made by a debtor with his creditor. *Kensington, Ex parte*, 2 Ves. & Bea. 83. *Mouniford, Ex parte*, 14 Ves. 606. *Monkhouse v. Corporation of Bedford*, 17 Ves. 381. *Langston, Ex parte*, ib. 230. The court, in this instance, presumes an agreement, on the ground that the deposit could be for no other purpose than as a security for the debt or sum advanced. But parol evidence is admissible to rebut this presumption, and to shew that the deeds were delivered for some other purpose.

No lien by parol agreement to deposit.

Nevertheless, a mere parol agreement to deposit title deeds as a security for a debt, without an actual delivery of the instruments to the creditor, will not confer any equitable lien. Thus, where a person having a renewable lease in his possession as equitable mortgagee, at the request of the mortgagor, delivered the same up to him for the purpose of obtaining a further term, and upon an additional advance it was agreed, that the further term should be a security for the original debt and the additional advances; but no delivery was made to the mortgagee of the lease when renewed for the further term, and the mortgagor became bankrupt: the court held, that there was a good mortgage of the original term, but that the parol agreement to deposit the further lease could give no title, and therefore dismissed the petition as to the further term. *Coombe, Ex parte*, 4 Madd. 249. See *infra*, div. 3, as to parol evidence, and a further advance.

Written agreement recommended.

But though a deposit without a word passing will create an equitable lien, yet a written agreement is always recommended, as it entitles the mortgagee to costs on his petition for sale, and, according to Sir W. Grant, there is no case, where a man is willing to part with his title deeds, in which he would not also be ready to sign a memorandum of two lines, specifying the purpose for which he has parted with them. *Norris v. Wilkinson*, 12 Ves. 197. Such writing, however, cannot be given in evidence without its being stamped, *Anon*, 2 Chris. B. L. 119, 2d edit.; and the 55 Geo. 3. c. 184, sch. 1, part 1, requires the same stamp as on a legal mortgage; but though there be an unstamped agreement between the parties which is inadmissible, yet other parol evidence may be adduced to shew for what purpose the deposit was made. *Hiern v. Mill*, 13 Ves. 114.

No second equitable mortgage.

There can be no second equitable mortgage. Thus, where A. (the depositary of a lease for 400l.) filed a bill praying a sale in the usual manner. B. who had also lent the bankrupt 250l. on the same security, put in his claim, stating, that he went with the bankrupt to the counting house of the petitioner, and there saw his principal clerk, and it was agreed between them, that as the petitioner was to advance the larger sum, he should have the possession of the lease, which, however, was to be likewise subject to B.'s claim. Lord Eldon declared, that he knew of no case that went the length of saying, that the mere deposit of a deed with one man should be evidence of his being a trustee for another. It might be otherwise where the depositary had himself advanced nothing; and if therefore there had been a concomitant advance on the part of the person so claiming to be *cestui que trust*, and a dealing with the estate connected with that advance, it might be considered as evidence, that the depositary advancing nothing, was a trustee. But his Lordship was at a loss to determine, whether the interest which the evidence sought to establish in the land, was prior to, or joint with, A.'s, or interposed between his two advances; and all this went to prove, that, departing from the rule given by the statute, there was no rule to go by; and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing. The order was con-

fined to the sums advanced by A. only. *Whitbread, Ex parte*, 19 Ves. 215. S. C. 1 Rose, 301.

The delivery over of deeds by a tenant for life will not create a lien on the estate by way of equitable incumbrance, so as to have the effect of charging the inheritance with any part of the money borrowed; but proof may be adduced to shew the remainder-man's assent to the deeds being deposited as a security of the money borrowed, or any part of it. *Williams v. Medlicot*, 6 Price, 495.

An equitable mortgage taken as a farther security to an annuity at a subsequent period, need not be registered. It is not affected by the statute of frauds, nor is it within the provisions of the annuity act. And its not being a grant, but a mere engagement without deed, it cannot be requisite that it should be registered. *Price, Ex parte*, 1 Buck. B. C. 221, et vide antea, 621, of this edition, n. (K).

It is also observable, that where a person has taken the deposit of a lease as a collateral security, he will be decreed to take an assignment of the term, and so become charged with the reserved rent and covenants. *Lucas v. Comerford*, 3 Bro. C. C. 166. S. C. 1 Ves. jun. 235, and acknowledged as good law, 6 Price, 461. As to the particular covenants, to be inserted in such assignment, see *Pember v. Mather*, 1 Bro. C. C. 53. *Staines v. Morris*, 1 Ves. & Bea. 8. *Wilkins v. Fry*, 1 Meriv. 244. 263, 264; et antea, p. 198, of this edition, n. (m).

-We now proceed to enquire, *first*, what will be a sufficient delivery to bring the case within the doctrine of equitable lien; and 1^o, it may be remarked, that a banker will acquire no lien on muniments casually left in his counting house, after he has refused to advance money on them. *Lucas v. Dorreain*, 7 Taunt. 278; and if the borrower afterwards become bankrupt, his assignees may maintain an action of trover for the recovery of the muniments so permitted to remain with the banker. S. C. 1 J. B. Moore, 29.

So 2^o, The possession of deeds delivered on the execution of a conveyance, which afterwards proves to be void, will not it seems confer an equitable lien on the land for the consideration money of such conveyance. Thus where the grant of an annuity was void for want of registration of the memorial, and it was contended that the grantee having the deeds, was an equitable mortgagee, Lord Eldon, on petition, refused so to consider him; but if the mortgagee chose to file a bill, his Lordship would make an order to give him the full benefit of that species of proceeding, and, if he had the deeds in his hands, the assignees (the grantor having become bankrupt) would have great difficulty in obtaining them from him, but his claim as an equitable mortgagee was very different. *Wright, Ex parte*, 19 Ves. 259.

3^o. The delivery of deeds to the pawner's wife, or other person over whom he has control, will not be a sufficient delivery of the deeds to create a valid equitable security. The case of *Coming, Ex parte*, 9 Ves. 115, turned on these curious circumstances. Previously to the bankruptcy of the borrower, the petitioner agreed to lend the bankrupt 1500*l.*, for which purpose he sold out stock of that value, upon condition that the bankrupt should make a security by way of mortgage, to replace the stock within twelve months, and to pay the dividends in the meantime; in pursuance of this agreement, the bankrupt deposited title deeds with his wife, who swore that the deeds from that time remained in a trunk of which she kept the key, until they were taken away by the messenger. One question was, whether this was an equitable mortgage. Lord Eldon observed, that no case had gone the length of saying, that if the deposit were in the hands of a person who could fairly be called a third person abstracted from both, that that should not be considered a deposit for the creditor, provided such was proved to be the intention. But it was very delicate, when the deposit remained in the hands of the mortgagee himself; and the noble Lord doubted much, whether a mere memorandum, kept in the borrower's own possession, and not parted with, to the man in whose favour it was expressed, would take it out of the statute. It was very nearly the same, where deeds were put into the hands of the wife of the mortgagor to keep them as between her husband and the creditor. It would be too dangerous to hold, that the wife of the bankrupt could be considered a depositary of the deeds for the debt of the petitioner, who therefore could not support his mortgage, but, with reference to the agreement to replace the stock at a particular day, the mortgagee should be at liberty to prove the amount of his debt, 9 Ves. 118.

4^o. Whether delivery of all the title deeds be necessary to constitute an equitable deposit, has not yet been finally settled. In *Wetherell, Ex parte*,

Tenant for life.

Registration.

Equitable mortgagee must take assignment.

Casual deposit creates no lien.

No lien by delivery of deeds on execution of void conveyance. Semb.

Deeds deposited with mortgagor's wife, and kept in separate trunk, not sufficiently delivered.

Agreement for deposit kept by mortgagor, no avail.

Unsettled whether all deeds

necessary to be delivered.

11 Ves. 398. A. agreed to deposit with his bankers the title deeds of an estate for the balance of his account. He accordingly sent a bundle of papers to the banking house of the petitioners, (represented to be the title deeds of that estate,) which the petitioners put up without examination. They continued to make further advances until the bankruptcy of A.; after which, they discovered that the deeds related only to a moiety of the estate intended to be charged, and brought the title no further down than to the year 1725, the bankrupt having retained the other deeds, which fell into the possession of the assignees on his bankruptcy. A memorandum was also produced by the petitioners, written by A., and intitled, "A schedule of the annual value of the property of A., given in security to Messrs. M. and Co." The first article in this schedule was the entire estate in question. Lord Eldon said, there was sufficient evidence in writing (and on that he founded his decision) to raise an equitable mortgage on the whole estate. It had never yet been decided how far it was necessary to deliver all the title deeds; or whether that would not be taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security. If a person having the title deeds of another, handed them over to a third person, there would be insuperable difficulty in getting them back from that person. But a mere deposit would not bind the borrower to give an actual interest in the estate. 11 Ves. 403. This latter position must now be considered untenable. It was expressly over-ruled in 6 Price, 458.

Inferred from recent case that they must.

But the necessity of having the whole title deeds may be fairly inferred from the late case of *Pearse, Ex parte*, 1 Buck. B. C. 525, though that case it must be admitted evades the precise point. A person who afterwards became bankrupt agreed with A. to execute a mortgage of certain premises for the security of a debt, and he sent, (in order that A. might prepare the mortgage,) all the title deeds, except the immediate conveyance to himself. The bankrupt being also indebted to B. deposited that conveyance with him as a security for his debt, at the same time promising to send him the remainder of the title deeds. Lord Eldon was of opinion (after much consideration,) that neither the one nor the other of the depositaries had an equitable mortgage. The way in which they had been driven to frame the petition was, in itself, an argument of no little weight against them. But how far the assignees could get the deeds from them, was another matter. It was enough to say, that the one was not intended to have a valid security till a legal conveyance had been executed to him, and that the other was not to have an equitable mortgage till he procured possession of the whole of the deeds. 1 Buck. B. C. 527.

Deeds delivered to attorney to prepare mortgage, not an equitable deposit.

50. It is requisite that the deposit be made with a view to an immediate security and not for any other purpose. The decision which first established this position was considered to have proceeded on a very refined principle and was much doubted at the time of its enunciation. It was this:—One Botville, a gunpowder-maker, had contracted with the defendant for as much salt-petre as came to £24l, but not having ready money to pay for the same, proposed to make a mortgage of an estate he had in his own possession by way of security for the money; and in order thereto left with the defendant the title deeds to get the assignment drawn; the defendant carried the deeds to an attorney, to look into the title, and draw the mortgage. The attorney kept them by him for some time, and then died without having drawn the assurance; after which the defendant carried the deeds to a scrivener for the same purpose; but before the assignment was perfected, the said Botville became bankrupt. The plaintiff (assignee of the commissioners) then brought his bill to have the deeds delivered up, that so the estate might be sold for the satisfaction of creditors, and Lord Cowper so decreed, with costs. *Brander v. Boles*, Gilb. Eq. Ca. 35. S. C. Pr. Ch. 375. A similar point was made in *Brizick v. Manners*, but at the hearing it was given up, and Lord Hardwicke thought rightly; for what had been done between the parties in writing was not by way of contract, but only as instructions to an attorney for a further act to be completed afterwards; and if this were to be decreed as the party's agreement in every case where a man had given loose instructions to draw articles, the party might be brought into Chancery for performance of the instructions as of articles themselves; a thing which could not be tolerated, 9 Mod. 284. This determination was followed by *Bulkeel, Ex parte*, 3 Cox, 243, where Lord Thurlow declared, that the case before him did not come within the rule established by the Court, viz. that the deposit of title deeds as a security for money shall be taken as a mortgage; for that here the deeds were not deposited ex-

precisely as a pledge for securing any particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security which was to be afterwards executed; but the bankruptcy intervening, prevented the transaction being effected, and his Lordship dismissed the petition, 2 Cox. 247. The deeds, in this case, were sent by the debtor to the creditor, and by him delivered over to an attorney with instructions to prepare a mortgage.

The next case is still stronger in corroboration of the doctrine, that a deposit *discreto intuitu* will not create an equitable lien. The case is that of *Wilkinson v. Norris*, 12 Ves. 192, where Sir W. Grant, M. R. in the course of his judgment said, that when the deposit is made at the same time that the money is advanced, there is little to be supplied with reference to the nature of the agreement; it being obvious that the purpose of the deposit must be to secure the re-payment of the money. But the connection was not so direct between a debt antecedently due and a subsequent deposit; nor was the inference so plain where persons in trade were dealing with each other on credit. Some debts were due: some contracted: but the term of payment not arrived. New dealings might every day give rise to new debts. Under these circumstances, what was to be gathered from the mere fact of a deposit of deeds; supposing the transaction to be of that nature? Was the deposit to be a security for the debt due only, or also for the debt contracted? The plaintiffs said, they were to have a security for every thing due or to grow due. The defendants contended that it never was in contemplation to give a security for more than the sum due. But the case before his Honour did not present an instance of equitable mortgage by deposit of deeds, for it was clear, the deeds were not delivered by way of deposit in the sense in which that word had been used in the previous decisions, viz. as a present and immediate security, but were delivered only for the purpose of enabling the attorney to draw the mortgage, which it was alleged the bankrupt agreed to give. In all the cases that had been referred to, the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute an immediate pledge, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which the parties had in contemplation. 12 Ves. 200. So in the late case of *Hooper*, *Ex parte*, the reason why Lord Eldon refused a mortgagee liberty to treat the deposit of a deed of conveyance as an equitable mortgage, was because the contract under which he held such deed was a contract for conveyance only, and not for deposit. 1 Meriv. 9. See also this doctrine acquiesced in by *Ld. C. B. Richards*, 6 Price, 468.

Thus far an unbroken chain can be traced, but the next case presents us with a disjointed link:—A. claiming a lien by deposit of title deeds, presented a petition for sale of the premises. It appeared in evidence that the deeds had been delivered to him, not as a security, but in order that a legal mortgage might be prepared; and that circumstance was relied on by the assignees in bankruptcy as an objection. The Lord Chancellor, however, over-ruled the objection, and ordered a sale, observing, that the principle of equitable mortgages was, that the deposit of deeds was evidence of an agreement; and if they were deposited for the express purpose of preparing a legal security, he asked, was not that *stronger than an implied intention*? Certainly it was, and that objection suggested itself to Sir William Grant, in *Norris v. Wilkinson*, but his Honour felt himself bound by authority, though it did appear inconsistent with reason. *Bruce*, *Ex parte*, 1 Rose, 374. The deeds, in this case, were delivered to the creditor himself, and not to a third person; so they were in *Bulleit*, *Ex parte*, but the decision was different. There cannot possibly be a reasonable distinction on the trivial circumstance to whom the deeds are delivered.

It is necessary to add, that the case of *Edge v. Worthington* is to be found in the books, (1 Cox, 211) which appears to coincide with *Bruce*, *Ex parte*. The case was this:—The plaintiff being entitled to a share of personal estate, applied to the executor for payment of what was coming due; he paid a part, and being pressed for the residue, offered a security on his real estate. C., an attorney, then attended him on behalf of the plaintiff, and the executor agreed with C. to give the plaintiff a mortgage on a house in Manchester, and promised to send the title deeds to C., which he did accordingly. The mortgage was prepared, but before it was executed the

This doctrine confirmed.

Economy of equitable mortgages.

Deeds delivered expressly to prepare mortgage, evidence of intended lien.

Agreement to make mortgage proved by parol. Deeds delivered to prepare same, held to create equitable deposit.

executor became bankrupt, whereupon his assignees possessed themselves of the house in question. The plaintiff claiming to be mortgagee of this house, filed a bill for foreclosure in the usual way. Sir Lloyd Kenyon, M. R., after lamenting that the strict line of the statute had ever been departed from, said, that it had been supposed the present case fell short of the decided cases, but it seemed to him to be stronger. The circumstance of the deeds being deposited, left it to the court to infer an agreement, or to admit *parol evidence of the actual agreement*. Here the *parol evidence proved the actual agreement*. C. had, from time to time, applied for a mortgage, and ultimately his proposal was acceded to; and the creditor promised to make a mortgage, and to send the deeds to the attorney for that purpose. When the deeds were sent the agreement was so far performed; and the deeds could not be obtained back, but on payment of the money. The Master of the Rolls therefore thought that this was a case out of the statute, the deposit of the deeds being such a circumstance of performance of the agreement, that a court of equity must decree it to be carried into execution, and declared that the transaction between the attorney and executor amounted to a valid agreement to execute a mortgage. 1 Cox, 211.

Two preceding cases questioned.

In these cases it is easy to discover a want of due attention to the distinction between a deposit, as an immediate pledge of the very deeds, and a delivery of them in conformity to an agreement, which being supported by *parol only*, is not binding, though it be partly performed; and there is a very essential and palpable difference between a deposit, in the present acceptance of that word, and an agreement accompanied with a delivery of deeds in part performance, in which latter instance, the previous agreement explains the purpose for which the deeds were delivered, and rebuts the presumed contract which would otherwise arise, that the deeds were handed over with a view to a present security. A reasonable doubt therefore may it is respectfully submitted, be entertained of the authority of the two preceding determinations.

Deposit noticed at law, but delivery to prepare assignment, creates no lien there.

6^o. The deposit of an original lease creates such a lien on the land as is noticed in a court of law. *Hawkins v. Ramsbotham*, 4 Campb. 121. & C. 1 Price, 138. But mere instructions for an assignment will not, in a court of law, add to the value of the deposit, as appears by *Hankey v. Vernon*, where the court of King's Bench thought, that as to the value of the deposit, the facts proved at the trial, namely, the instructions for the assignment previous to the act of bankruptcy, were not sufficient to give the bankers a lien on the ships, 2 Cox, 13.

Equitable mortgage by deposit of copy of court rolls.

Second. It was proposed to enquire whether the delivery of copies of court roll will create any lien on the lands. In the only case on the subject, it was contended that copies of court rolls were not title deeds, but mere abstracts, and might be had from the steward of the manor by applying for them, so that two or more persons might claim an equitable lien in respect of the same estate. But Lord Eldon could not distinguish the cases, and permitted the depositary of the copies to take an order for sale subject to an enquiry as to the amount of his debt. *Warner, Ex parte*, 1 Rose, 287. S. C. 19 Ves. 202.

Deposit will cover future advance, if supported by evidence, or oath, uncontradicted.

Third. An equitable mortgage by deposit of deeds may be extended to future advances by implication [*quære*] or *parol agreement*, and though the original delivery be to secure a sum of money to a particular firm or company, yet, on a change of partners, the deposit may be construed to embrace future advances by the new firm, without a re-delivery of the deeds. But in this case, a mere understanding between the parties will not alone be sufficient unless it amounts in a fair sense to an agreement. *Kensington, Ex parte*, 2 Ves. & Bea. 79. *Norman, Ex parte*, 2 Chris. B. L. 121. 2d ed. Where A. borrowed 4000*l.* of B. on the deposit of title deeds, and afterwards obtained from him a further advance, and then became bankrupt, ratifying however (after the bankruptcy) the deposit as well for the sum originally borrowed as for the subsequent advance, B. was declared entitled to a lien for the whole amount, Lord Eldon observing, that as the court would infer from a deposit, that the money then advanced should be charged as if there were a written agreement, there was no doubt that if it were made out on oath uncontradicted, additional advances might also be charged. *Langston, Ex parte*, 17 Ves. 227. S. C. 1 Rose, 26. Some doubt seems to have been entertained by the Master of the Rolls on this point, in *Norris v. Wilkinson*, supra, and in *Vanderzee v. Willis*, 3 Bro. C. C. 21, it was held that bankers having securities deposited with them as a pledge for a certain sum, should not be allowed any thing beyond that sum, though the depositor at his

death be indebted to a larger amount. But the above is now the prevalent opinion of the profession.

If the creditor by his bill, or in case of his debtor's bankruptcy, by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor by his answer to the bill, or by affidavit in bankruptcy, deny the fact, the court will direct an enquiry to be made by the master or the commissioners, in respect of what debt the deposit was made. In which case resort may be had to parol testimony. *Mountfort, Ex parte*, 14 Ves. 606.

From these cases it may be collected, that if A. deposits deeds with B. for safe custody and afterwards becomes indebted to B. in a sum of money, and nothing transpires as to the deeds, B. will not be at liberty to retain the deeds till the money be repaid; but he will be allowed to adduce evidence to shew that it was agreed he should so retain the deeds, or his oath uncontradicted will produce the same effect.

If a legal mortgage be made as a security for debts to be contracted to a stipulated amount, that limit cannot be enlarged by a parol agreement. *Norman, Ex parte*, 2 Chris. B. L. 121. So a legal mortgage cannot by parol be made to embrace future loans to the same mortgagor. Thus, in *Hooper, Ex parte*, 2 Rose, 328, there was a legal mortgage for 400*l*, and a further sum afterwards advanced, for which the mortgagor agreed to execute a mortgage, and in the mean time the additional sum was to be considered as tacked to, and included in, the former security. The interest was from time to time paid on both sums; a further mortgage was not executed; the mortgagee died, and the mortgagor became bankrupt. The petitioner, who was the executor of the mortgagee, prayed that the mortgaged premises might be sold and applied in payment of both sums; but the petition was dismissed, with liberty, however, to file a bill. 1 Meriv. 7. By Mr. Vesey's report of the same case, it appears that Lord Eldon spoke as follows:—"With great deference to Lord Thurlow, I repeat, that the case of *Russell v. Russell*, 1 Bro. C. C. 269, ought not to have been decided as it was. The vice of that decision is, that it supposes that the deposit can refer to nothing but an intention to subject the estate. To that I do not agree. A deposit of title deeds may be of considerable use without any such object. The right to hold them, and so to work out payment, is of great value; and there are many cases in which that right may be maintained against all the owners of the estate. That decision, however, has been repeatedly followed, and it must not now be disturbed. Without saying whether, in the case of a parol contract for the sale of an estate, payment of the whole price would be a part performance that would support the contract; my opinion is, that, where the contract is for a mortgage the advance of the whole sum cannot have that effect," and, "I say, confidently, that there never was a case, where a man, having taken a mortgage, by a legal conveyance, was afterwards permitted to hold that estate as farther charged, not by a legal contract, but by inference from the possession of the deeds. The other cases have gone far enough, indeed too far; and I will not add to their authority, where there are circumstances distinguishing the case before me." The order was consequently confined to the legal mortgage, 19 Ves. 480.

Fourth. We pass on to the subject of priority, and remark, 1^o, that an equitable mortgagee by deposit, will acquire priority against the crown for a simple contract debt found due by inquisition after the date of the deposit, if the loan advanced by the mortgagee be for an honest purpose. Thus, in *Casford v. Attorney-General*, 6 Pri. 411, the plaintiff lent Jones (a collector of taxes, and afterwards a defaulter,) a sum of 1000*l*. secured by bond, and the deposit of deeds. The bond recited, that the title-deeds to the houses in question, had been delivered by Jones to the plaintiff by way of deposit for 1000*l*. and interest. The integrity of the transaction was admitted,—there being no suggestion thrown out by the evidence, or otherwise, that the plaintiff knew any more of Jones's situation, than any stranger might have known. One question was, whether a deposit of deeds would affect the crown? It was admitted by the Chief Baron, (citing *King v. Mainwaring*, 2 Price, 67) that if there had been a conveyance of an equity of redemption, it would have conferred a good title against the crown; but very considerable difficulty, added his Lordship, occurred from doctrines which were to a certain extent well settled, viz. that there could be no *equities* against the crown, and that the crown could not, generally speaking, be considered a trustee. If the crown had acquired the legal estate, there was no way of

Enquiry directed whether deposit will cover subsequent advance.

Corollary.

Legal mortgage not extendable by parol to embrace additional loan.

Effect of possession of deeds not as deposit.

Deposit constitutes equitable lien against crown.

Debtor to crown by simple contract and record, distinguished as to legal and equitable mortgage.

Equitable mortgagee not preferred to crown, if his conduct dishonest.

Equitable preferred to legal mortgage with notice.

Secus, if legal mortgage made without notice of former deposit.

obtaining it out of the crown's hands for the benefit of a person who would have been a *cestui que trust*; but it was not so in the present case; the crown had no estate at all; the estate had never passed over, it was yet *in medio*, and it was the money only arising from the sale of the estate which in the present case was in dispute. Then the plaintiff being equitable mortgagee, was of course entitled to be paid before the crown, if his title in point of time, were anterior to that of the king. It was in the next place necessary, to enquire, whether Jones was a debtor to the crown by simple contract or by record. If he were a debtor to the crown of record, or one of the persons described in the 13 Eliz. c. 4. s. 1, there was no doubt that, whether there were an equitable or legal mortgage on his lands, it would not have affected the crown; for the crown would have a right, the moment he became a debtor of record, or came within the statute of Eliz., to have seized his lands, although they should have been subsequently mortgaged. But if he was not a debtor on record, (as he clearly was not, for his debt was never put on record,) nor had given bond to the crown, and if he was not within the statute of Eliz., then he was merely an ordinary simple contract debtor, and the crown had no right to the estate at the time of the equitable incumbrance, nor until he became a debtor by record, which he did not until the inquisition was taken, and that was not till a considerable time after the deposit was made; and indeed it was not even alleged, that he was a debtor of record at that time. Under these circumstances the decree should be for the plaintiff. 6 Pri. 477.

If, however, the advance be for the express purpose of upholding a failing collector till he becomes further involved, the court will consider the loan as founded in fraud, and will not lend its assistance to the deposit whereon it was intended to be secured. In *Broughton v. Davis*, the court said, the loan for which the plaintiff had a deposit, was an unjustifiable endeavour to sustain the apparent credit of the defendant, a sinking receiver. The evil consequence of which was, that Davis was enabled to go on as a collector, and to impose himself on the public as a responsible man, and he continued to involve the parish, who might have been very considerably relieved if the extent had issued when he first became unable to pass his accounts; but upheld by the plaintiff, he was encouraged to plunge further in debt to the crown, which but for that undue assistance he could not have done. The Barons therefore were of opinion that the plaintiff could not sustain his equitable mortgage, and dismissed his bill. 1 Pri. 223, 4.

2^d. A prior equitable mortgagee will be preferred to a subsequent mortgagee of the legal estate, if the latter have notice of the former deposit. Thus, in *Birch v. Ellames*, 2 Anstr. 427, title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, antedated a month, to prevent the appearance of its having been done in expectation of the bankruptcy. The defendant by his answer admitted, that upon executing the mortgage, he enquired for the deeds, and was informed of their being in the hands of the plaintiff (as he understood) for safe custody only. Lord C. B. Macdonald observed, that the presumed agreement on an equitable mortgage by deposit, was to be carried into execution by the court against the mortgagor, or any claiming under him with notice, either actual or constructive, of such deposit. The defendant in the present case, though he enquired for the deeds, cautiously avoided asking the reason of the deposit. The court was therefore of opinion, that he avoided acting in the usual way, on purpose to have a pretence of want of express notice, and if this defence could be sustained, no equitable title could ever be made good against a subsequent purchaser. For these reasons the decree was, that the defendant should pay the demand of the plaintiff, or stand foreclosed.

The preceding case raised a question, whether a subsequent legal mortgagee, without deeds and without notice, would be preferred at law to a prior equitable mortgagee by deposit. This has been decided in favour of the legal mortgagee in the strongest possible case:—Title deeds were deposited with the plaintiff as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a mortgage of the legal estate, without notice of the former equitable incumbrance. The plaintiff endeavoured to fix the defendant with actual notice of the deposit, and for that purpose read the testimony of the mortgagor, who swore that he had informed the defendant of the deposit of the title deeds before the execution of the mortgage. Eyre, C. B. said, the testimony of the mortgagor alone, unsupported and opposed, was too weak to found a decree, or even

to direct an issue upon. Swearing to the fraudulent intention of his own deed, he could expect little credit in a court of equity. [As to this, see *Walton v. Shelly*, 1 T. R. 296.] It had been said, that no man would advance money on an estate, without seeing the title deeds, unless with a fraudulent intention. The Chief Baron wished some solid distinction had been established in a court of equity, between a consideration which was an old debt, and a sum advanced *de novo*; there certainly was a great difference: in the one case the creditor jumped at any security he could obtain, he took the deed of conveyance now, and trusted to getting the title deeds afterwards, but till such a distinction were established, it was difficult to apply the reasoning which would belong to it. The person who took the legal estate without the deeds, in a case like this, appeared (unless there were fraud) to be less blameable than he who took the deeds without the estate. Upon all the circumstances, there was nothing in the case before the court that amounted to constructive notice. With respect to the general question, the effect of leaving the title deeds in the hands of the mortgagor, the most intelligible rule, and the one most agreeable to justice, would have been to say, that if a man takes for his security a single deed, and leaves the other deeds in the hands of the mortgagor, so as to enable him to commit a fraud, he shall, without reference to the quantity of pains or diligence which he exercised to obtain the deeds, be postponed; for whether the pains were more or less, the mischief was the same. The case of *Mocatto v. Murgatroyd*, was a strong case, but the Chief Baron found none that went the length of saying, that a failure of the utmost circumspection should have the same effect of postponing a mortgage, as if he were guilty of fraud or wilful neglect. In the present case, all the negligence, or all the activity in the world, would have left the defendant in exactly the same situation in which he then was. He took this mortgage as the only security he could get; if it were already mortgaged, he was only where he was before; he seized it as a plank to save something, for as a second mortgage it was worth something." The plaintiff having therefore failed in making out his case of fraud, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill was dismissed with costs. *Plumb v. Fluit*, 2 Anstr. 441. In *Hiers v. Mill*, (a case on the same subject), the subsequent legal mortgagee was fixed with clear notice of the former deposit, though he denied notice in his answer, and averred that he had not the least reason to suspect that the deeds were deposited with the plaintiff by way of mortgage, believing that they were held by him (he being an attorney) for safe custody merely. 13 Ves. 114. As to notice by registration, see *ante*, 628, of this edition, *in notis*.

If a person deposit deeds, and afterwards procures their re-delivery under pretence of obtaining a new term in the lease, and then deposits them with another person, the former depositary will not be deprived of his lien and priority. Thus, where M., being in possession of all the title deeds of certain leasehold premises, as a security for a debt, at the request of the debtor, delivered to the solicitor of the original lessor, upon an engagement of re-delivery, the original lease, and the immediate assignment to the debtor, who afterwards became bankrupt for the purpose of enabling him to procure an extension of the term; and the bankrupt received the lease and assignment from the solicitor, and deposited them with C. as a security for money advanced; and after the bankruptcy, C. upon payment of his claim, delivered the lease and assignment to the assignees under the commission; it was held, that M. was in equity to be considered as in possession of the lease and assignment, and that he had therefore a priority of lien; for the retainer by the bankrupt of the lease and assignment, was a fraud, and should not enure to the prejudice of his creditor; and C. having an equity only, could give no better title to the assignees. *Meux, Ex parte*, 1 Glyn & Jam. Rep. 116.

Fifth. A transfer of the deposit may be effected by delivery, as well as a deposit created in the first instance, by handing over the deeds. Therefore where A. deposited with B. two leases for 560l., and afterwards assigned all his estate and effects to C. (a creditor to a large amount) for his own benefit, and C. paid several creditors ten shillings in the pound, and B. in full, receiving from him the said two leases, and A. was subsequently declared bankrupt, (the assignment to C. being the act of bankruptcy) it was held, that though that assignment created no lien as to C.'s general debt, yet C. had a lien to the amount of B.'s debt, by the transfer

Depositary, putting with lease for renewal, not deprived of priority.

Equitable transfer.

and deposit of the leases. *Smith, Ex parte*, 1 Ves. & Bea. 518. So a mortgagee of the legal estate may transfer the benefit of his security to a third person, by delivery of the mortgage and bond, and such assignment will be binding on the assignees of a bankrupt mortgagor, who will be decreed to assign and execute the sub-mortgage contract accordingly; and notice to the mortgagor of this equitable assignment will not be requisite. *Jones v. Gibbons*, 9 Ves. 411. But the deposit of the bond alone will not create any lien, for that, if allowed, would be turning an unassignable into an assignable instrument. *Cator v. Burke*, 1 Bro. C. C. 434. The following was held a good equitable assignment of a debt, though a *chose in action*, and available in equity against the assignees in bankruptcy of the assignor: "To F. Klein, Esq. acting executor of the late John Fish: Please to pay Messrs. G. and T. Alderson, or order, 417l. 6s., as part of the amount due to me for plumber's work done for the late John Fish, Esq.—Jane Row." *Alderson, Ex parte*, 1 Madd. Rep. 53. Hence it may be inferred, that a draft for the mortgage money by a legatee of a mortgagee on the executor, delivered to a third person, would be a good assignment in equity of the mortgage debt, though not of the pledge itself.—But if a person who has title deeds lodged with him for a particular purpose, other than by way of lien, raises money on them by delivering them over, the mortgage will not be good, and the mortgagee will be ordered to deliver them up to the right owner, for it was his own fault that he took the deeds without inquiring into the title. *Jackson v. Butler*, 2 Atk. 306.

Of equitable mortgagee's petition for sale in bankruptcy.

Sixth. It is settled, that Lord Loughborough's general order in *bankruptcy*, (4 Bro. C. C. 548,) does not apply to equitable mortgages. *Payler, Ex parte*, 16 Ves. 434. *Topham, Ex parte*, 1 Madd. Rep. 38. The consequence is, that in the instance of an equitable mortgage, a different mode of proceeding is adopted in bankruptcy than is used in other cases. The creditor applies by petition to the court of Chancery for a sale of the premises in the first instance, and that he might be permitted to come in under the commission for the deficiency. This petition he may present without having previously proved his debt. *Jennings, Ex parte*, 1 Madd. Rep. 331. A petition, however, seems to be a wrong mode of proceeding, where there is a subsequent purchaser or mortgagee and he objects to the sale. In that case a bill is the proper remedy. *Topham, Ex parte*, *ubi supra*. In deciding on an equitable mortgage, the validity of the debt will of course be considered, and every circumstance weighed which may be adduced to impeach it. But the validity of an equitable mortgage is never referred to the consideration of the commissioners. The court decides unequivocally on that; and having decided that, it will, if necessary, refer it to the commissioners to ascertain the amount of what is due upon such mortgage, that being a matter of account. If the court considers a security to be good, and directs the commissioners to take an account of what is due on such security, they cannot examine and undo its decision, but have only to consider, as a matter of figures, what is due. *Jennings, Ex parte*, 1 Madd. Rep. 336. To assist them in this, they may call the equitable mortgagee, and examine him as to the principal and interest due. 2 Chria. B. L. 323.

Lease not to be assigned without licence, yet deposit good against assignees.

If a deposit be made out by clear admissible evidence against the bankrupt himself, it will be binding on his assignees. 11 Ves. 403. Thus, where an equitable mortgagee by deposit applied for an order to sell the premises, and that he might prove for the residue of his debt. It was objected on the part of the assignees, that the deposit was good for nothing, inasmuch as the lease contained a covenant against assigning without licence from the lessor; and no such licence had been obtained. The Lord Chancellor however over-ruled the objection, for that the lessor might perhaps waive the forfeiture, and the petitioner had a right as against the assignees to avail himself of the advantage which he had obtained by possession of the lease. *Haglehole, Ex parte*, 1 Rose, 432. See similar determinations in *Doe v. Bevan*, 3 Man. & S. 353; and *Sherman, Ex parte*, 1 Buck. B. C. 462.

Equitable mortgagee, parting with deeds, not deprived of lien, when.

Where an equitable mortgagee, by possession of title deeds, delivered the same up to a purchaser, (who was the assignee of the bankrupt mortgagor,) on receipt of all the money arising from the sale, which was not sufficient to satisfy his debt, it was held, first, that the assignee and purchaser having re-sold the premises at a profit of 500l, the same was to be carried to the bankrupt's account as part of the produce of his estate; and, secondly, that the equitable mortgagee had not, by giving up the deeds, deprived himself of his lien for the deficiency, which he was entitled to be paid in full, in pre-

ference to the other creditors, *Morgan, Ex parte*, 12 Ves. 6. That an assignee purchasing the trust estate becomes responsible for any profit he may obtain by it; see *Lacey, Ex parte*, 6 Ves. 625; and *Grant v. Mills*, 2 Ves. & Bea. 306.

An act of bankruptcy between the time of the original deposit, and a transfer of such deposit, will vitiate the assignment, if the mortgagor be a party and enter into a new collateral security to the transferee. Thus, where A. deposited with B. the lease of the premises in question, and afterwards applied to C. to pay off B.'s debts, which C. agreed to do, and on 20th of January, 1810, went with C. to B., whose debt C. paid, and received the lease. On the same day, A. executed a warrant of attorney, with a defeasance, reciting, that C. had lent him 1200*l*, and that he had deposited with C. the lease of his premises as a security. A commission of bankruptcy issued against A. in August, 1810, on an act committed the 10th of January preceding. Lord Eldon said, the question was, whether B. was to be considered as the agent of the bankrupt, and C. as dealing with him for an assignment of his security. The justice of the case certainly pointed to that, but there was no doctrine to be more carefully watched than that of lien on deposits. C. had unfortunately taken a deposit from A. instead of an assignment from B. Could then the rights of C. be carried further on a deposit of deeds than on an actual mortgage? Suppose a mortgage and no person a party to it but the bankrupt, could his lender have claimed to have been in a better situation, and could he take this deposit (against the recital in the defeasance) otherwise than on a mortgage?—On these questions C.'s petition was dismissed, without prejudice however to his bringing a bill. *Combe, Ex parte*, 17 Ves. 369.

If an equitable mortgagee procure from his borrower a legal mortgage, and before the expiration of two months become bankrupt or abscond, whereby the conveyance is rendered defeasible; yet the mortgage cannot be impeached; for "though the legal act were done in contemplation of bankruptcy, it is protected by the previous equitable title; being only effect given to a title created not in contemplation of bankruptcy, and, except in form, complete by the deposit." *Hiers v. Mill*, 13 Ves. 114.

Where A. deposited with B. the muniments of his title to leasehold premises at Brighton, as a security for a debt, and gave him power to sell the premises in case of default of payment, and B. assigned to C. for a balance of account, and A. becoming bankrupt, C. applied for liberty to sell, which was granted and effected before the Deputy Remembrancer; it was held, that the assignees in bankruptcy of the borrower were necessary parties to the conveyance to the purchaser, to embrace any equity of redemption that might be remaining in them. *Hawkins v. Ramsbottom*, 1 Pri. 138. 3 C. 4 Camp. 121.

Lastly, an equitable mortgagee will be allowed the costs of his petition for sale, provided some agreement in writing accompanies the deposit, but not otherwise. *Trew, Ex parte*, 3 Madd. 373. *Brightens, Ex parte*, 1 Swanst. 3. S. C. 1 Buck. B. C. 148. The rule was formerly different, as appears by *Garbutt, Ex parte*, 2 Rose, 78. *Horne, Ex parte*, 1 Madd. R. 622. & *Anon.* 2 ib. 281; but the above statement is supported by *Sikes, Ex parte*, 1 Buck. 349, and *Vauxhall Br. Co. Ex parte*, Glyn & Jam. Rep. 101, in which latter case, it was held, that the general rule of giving costs out of the proceeds of the sale, where there is a written document will prevail, though the written instrument may require the aid of parol testimony to explain it.

It merely remains to add, that a depositary of deeds will be responsible for gross neglect only; or, in other words, for a violation of good faith, and not for any casualty that may befall the deeds. Harg. Co. Litt. 89 a. n. (g). The notion of my Lord Coke, "that to keep, and to keep safely, are one and the same thing" (Co. Litt. 89 a.) was denied to be law by the whole court in *Coggs v. Bernard*, 1 Lord Raym. 911. If with a deposit of deeds there be no stipulation as to the degree of care, the pawnee will be answerable for ordinary neglect only; but all bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed on a lawful demand. *Jones on Bailm.* 42. 120.

Prior act of bankruptcy vitiates transfer.

Legal, protected by equitable, mortgage.

Assignees necessary parties to conveyance.

Costs.

Depositary must keep deeds as safely as he would his own.

SECTION II.

VENDOR'S LIEN FOR PURCHASE MONEY UNPAID.

It arises not-withstanding formal receipt, and binds party and all claiming under him with notice.

AT law the receipt of the purchase money, usually endorsed on the conveyance, is conclusive evidence of the payment of the money. *Rowntree v. Jacob*, 2 Taunt. 141. In equity the rule is different. If it be there shewn that the vendor received not any or a part only of the consideration, the vendee will become a trustee for the vendor for the amount of the money unpaid, and the vendor will have, by an implied contract between him and the vendee, an equitable lien on the estate for the amount of such money. *Pollexfen v. Moore*, 3 Atk. 272, and cases cited, ante, p. 354, of this edit. n. (P). If the purchaser become bankrupt the vendee will be considered as a mortgagee for the purchase money unpaid. *Chapman v. Turner*, 1 Vern. 267. Lord Eldon distinguishes the lien by deposit of deeds, and the lien by purchase money unpaid in the following terms:—"In purchase, payment is an essential part of the contract. In loan, the contract is as complete, and the relation of debtor and creditor attaches as firmly, whether there is any security or not. A mortgage or security is merely an accidental circumstance in a transaction concluded and complete by the advance of money." *Hooper, Ex parte*, 2 Rose, 328. S. C. 1 Meriv. 9. The lien under consideration, arises also in the case where a vendee advances all or a part of the money to the vendor, and the contract is broken off; the estate in the hands of the vendor then becomes charged with so much of the purchase money as the vendee shall have paid. *Burgess v. Wheat*, 1 W. Bl. 150. *Lacon v. Martino*, 3 Atk. 4. And this equitable lien will bind the lands in the hands of the party himself and his heirs, as also in the hands of volunteers, and *bonâ fide* purchasers with notice, claiming under him. *Mackreth v. Symmons*, 15 Ves. 337. *Walker v. Prewick*, 2 Ves. 622. *Elliot v. Edwards*, 3 Bos. & Pul. 188. *Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682.

Removed by what circumstances.

This implied contract may be rebutted by clear and irresistible evidence, shewing the intention of the parties, that the estate shall not be a security for the money, 15 Ves. 341. But it is settled that a mere personal security, whether a bond, an annuity secured by bond and covenant, bill of exchange, promissory note, or the like, without more, will not of itself be sufficient to remove the equitable lien. *Hearn v. Botelers*, Carey's Rep. 25. *Hughes v. Kearney*, 1 Sch. & Lef. 36. *Grant v. Mills*, 2 Ves. & Bea. 309. *Peake, Ex parte*, 1 Madd. R. 346. *Gibbons v. Baddall*, and *Mackreth v. Symmons*, supra. Nevertheless, a mortgage of other lands for the whole, or part, of the purchase money, (*Nairn v. Prowse*, 6 Ves. 752), or a mortgage of the purchased estate, for part of the purchase money, permitting the residue to remain on personal security (*Bond v. Kent*, supra, ante, p. 354, text) has been held to discharge this equitable lien; wholly in the first instance, and as to the amount of the money remaining on the personal security in the second. What act short of an express agreement will remove the equitable lien in these cases has not been definitively settled. The more modern authorities on this subject have brought it to this inconvenient state; that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken. *Mackreth v. Symmons*, ubi supra. Perhaps the best general rule is that suggested by the Master of the Rolls, in *Nairn v. Prowse*, viz. that if by allowing an equitable lien, the party will have a double security, *there* the circumstances afford evidence of an intention that the money on the personal security should not form a lien on the estate.

Priority of vendor's lien and equitable mortgage, decided by rule qui prior, &c.

Marshalling assets.

In *Mackreth v. Symmons*, the plaintiff had a lien as vendor, the defendant was a subsequent mortgagee, to whom an actual conveyance had been made by the assignees of the vendee: the defendant foreclosed, but without making the plaintiff a party to his bill. It proved, that the legal estate was outstanding in a third person, so that all the incumbrances were equitable. Lord Eldon, after noticing that fact, observed, that between equities, the rule, *Qui prior, &c.* applied, and gave judgment for the plaintiff.

If the vendee die, leaving a personal estate insufficient to pay all his debts and legacies, the better opinion seems to be, that a court of equity will arrange the assets so as to confine the vendor to his equitable lien, or permit others to stand in his place, according to the rule, ante, p. 890, of this edition, n. (6). But Mr. Sugden thinks the contrary in his *Vend. & Pur.* p. 467, 5th edition.

SECTION III.

OF SOLICITOR'S LIEN, AND MORTGAGES BETWEEN ATTORNEY AND CLIENT.

THIS section naturally divides itself into two parts, the *first* as to solicitor's lien, and the *second* as to mortgages taken by an attorney from his client.

First, An attorney has a lien for his general balance on all the papers of his client which come to his hands in the course of his professional employment. Where therefore C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods, at the suit of B. and the attorney paid the money to B. who, thereupon, delivered to him a lease which had been deposited by C. with B. as a security for the debt, it was held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands. *Stevenson v. Blakelock*, 1 Man. & S. 535. So, though papers do not come into the hands of an attorney or solicitor in the particular cause in which he makes the demand of costs he will have a lien. This, it is said, depends on practice; which is, that the attorney should have the lien; and that being once established, he trusts to it, and on the faith of it makes larger advances for his client in other causes. *Nesbit, Ex parte*, 2 Sch. & Lef. 279. A solicitor has a lien on costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Bryant, Ex parte*, 2 Rose, 237. In like manner an attorney will have a lien on quarterly payments of an annuity coming into his hands. *Skinner v. Sweet*, 3 Madd. 244. And it seems the attorney may obtain an order to prevent his client from receiving money recovered in a suit, in which he has been employed for him, until his bill be paid. *Wilkins v. Carmichael*, Doug. 104. 4th ed. et vide *Rex v. Bury*, ib. 194, n. (26). But, whether a solicitor's lien for his costs on a fund in court is general, or is confined to the costs of the particular suit, was made a question in *Verrall v. Johnson*, 2 Jac. & Walk. 214. An attorney, having a lien on the papers of A. and B. jointly, the court will not, if the lien be discharged, try the rights of the parties, by saying which shall be given up, or to whom. *Duncan v. Richmond*, 7 Taunt. 291. S. C. 1 J. B. Moore, 99.

Extent of solicitor's lien on papers and money received.

A question was made in *George v. George*, whether an attorney's lien will extend to the original will of his client. Without deciding the question, the will was ordered to be produced before the examiner for the hearing of the cause, so as not to prejudice the solicitor's lien if he had any, 18 Ves. 294. If a tenant for life give deeds into an attorney's hands, the attorney will have no lien on them for his costs against the remainder-man, for that would be to enable a tenant for life to charge the remainder-man. *Nesbit, Ex parte*, 2 Sch. & Lef. 279. But where a mortgagee having possession of the mortgagor's title-deeds lodged them with an attorney, it was held, that the attorney had a lien on them for business done for the mortgagee. *Schoole v. Sall*, 11b. 176. So where deeds were deposited with a solicitor for a particular purpose, and after that had failed they were permitted to remain with him, it was held that they were subject to his general lien. *Pemberton, Ex parte*, 18 Ves. 282. And in *Stirling, Ex parte*, 16 Ves. 258, it was held generally, that an attorney's lien on papers in his possession is not limited to the occasion on which they were delivered, without special agreement; et vide *Steele, Ex parte*, 16 Ves. 164.

Same.

Where the town agents of a country solicitor (since a bankrupt) had received papers from him, belonging to his client, for the purposes of the client's business, they were held to have a lien on them as against the client, for the amount of money due from him to the solicitor, and from the solicitor to them, on account of business done in the cause. And where the client had, after the solicitor's bankruptcy, paid the agent money to obtain such papers, although an action had been previously brought against him by the assignees for the recovery of it, the court of Exchequer granted and continued an injunction against the action, on the ground of the agent's lien. *Bray v. Hine*, 6 Pri. 203.

Agent's lien.

Where a solicitor who has papers in his hands relating to a bankrupt's estate, upon which he claims a lien for his bill of costs, comes in under the

Bankruptcy.

Effect of attorney's discharge, discontinuance to act, and death.

commission, and proves his debt, such proof is equivalent to payment, and he must deliver up the papers to the assignees. *Hornby, Ex parte*, 1 Buck. B. C. 354.

At law the party cannot change his attorney without a Judge's order, and the court provides, that the papers shall not be taken out of his hands without doing that justice which his lien gives him. But in equity a party may discharge his solicitor, and though he has a lien for his costs upon papers in his possession, yet he cannot (except by retaining them) prevent the progress of the cause until he is paid, *Twort v. Dayrell*, 13 Ves. 195, *O'Dea v. O'Dea*, 1 Sch. & Lef. 315; nor can he prevent his client discontinuing the action, subject to the costs incurred. *Merryweather v. Mellish*, 15 Ves. 162. Until the attorney's lien has been discharged the owner of the deeds will be entitled to inspect them. *Hornby, Ex parte*, 1 Buck. 354. This case seems an authority for a general inspection; but in *Ross v. Loughton*, 1 Ves. & Bea. 349, it was held, that though a discarded solicitor was bound to produce the papers of his client for him, or in case of his bankruptcy, for his assignees in the cause for the purposes for which he received them, yet he was not bound without payment to deliver them up, or produce them in *any other business*. In a later case however it was decided, that a solicitor *refusing* to proceed further in a cause, must allow the new solicitor to see the papers detained in his possession, until his bill be settled, at all reasonable times, and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose; and that he could not by virtue of his lien prevent the king's subject from obtaining justice, *Commerell v. Poynton*, 1 Swanst. 1; et vide *Cresswell v. Byron*, 14 Ves. 471, where it was held, that a solicitor having declined to act for his client, has no lien for his costs on a fund in court, and that an attorney quitting his client cannot bring an action for his bill. In *Usbridge, Ex parte*, an order was granted (without a cause in court depending) upon the general jurisdiction over a solicitor, that he should deliver his bill for the purpose of obtaining from him title deeds deposited with him for suffering recoveries. 6 Ves. 425. Where a plaintiff had, by a new attorney entered satisfaction on the record of a judgment, it was held, that the defendant was entitled to be discharged, although the costs of the plaintiff's attorney had not been satisfied. An attorney has no lien on the person of the defendant. *Marr v. Smith*, 4 Bar. & Ald. 466; et vide *Martia v. Francis*, 2 Ib. 402. The court will not order the representatives of a deceased solicitor to deliver the papers in a cause to another solicitor, unless the client will pay what is due to the representatives. But it seems the court will interfere against a solicitor's representatives in the same manner against the solicitor himself. *Redfern v. Sowerby*, 1 J. Wils. 96. 8 C. 1 Swanst. 84. *Fenwick v. Reed*, ante, 379, n. (G).

Representatives.

Attorney may take mortgage from client, though for costs, but he will be narrowly watched, and must produce vouchers.

Second. An attorney may contract with his client, provided no advantage be taken of the confidential relation between them. *Cane v. Allen*, 2 Dow. 289. Therefore, where a solicitor advanced money to his client to carry on his suit and to maintain him in the interim, and took a mortgage for securing the payment of the costs and money advanced, Lord Eldon did not say the security was void, but merely that it was of a nature which courts of justice viewed with great jealousy. If securities for past and future costs were regardlessly allowed, there certainly would be a wide opening for careless inattention in the expences. But a mortgage from a client to his attorney will not prevent the client from having the attorney's bill taxed. *Newman v. Payne*, 4 Bro. C. C. 350. In *Langstaffe v. Fenwick* the mortgagee was the attorney of the mortgagor, and the conduct of the attorney was considered not altogether free from blame in other circumstances, yet no objection was taken to the mortgage on account of the relation of attorney and client. 10 Ves. 405. S. C. ante, 297, of this edition, *in notis*. Beneficial contracts and conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, have also been decreed to stand as a security for what was actually due. *Wood v. Downes*, 18 Ves. 120. But though contracts between attorney and client are supported, yet the court will anxiously scrutinize all dealings between them, and protect the client from his own acts, done under the influence or ascendancy which the attorney in that character may have acquired over him. *Bellew v. Russell*, 1 Ball & Bea. 105. In mortgage transactions this rule is rigidly enforced. Thus, where an attorney and agent advanced money to his client and principal in various sums, and at different periods, from 1773 to 1778, taking securities and getting accounts settled, and the transactions were not impeached till 1783, the House

of Lords (confirming a decree of the court below) ordered the settled accounts to be opened, and the whole transaction sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced and proved to be so by other evidence than by the securities and settlement of accounts. But, as in the case of accounts in some sense settled, and a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party was to be admitted as evidence of the existence and import of such vouchers. *Morgan v. Lewis*, 4 Dow. 29. In the court below it was in this case also held, that where an attorney procures money on mortgage for his client from other clients, and gives up to the client mortgagor a bond, obtained from that client in respect of separate transactions between themselves, as part consideration of the mortgage, a separate account shall be taken of the mortgage transaction, and that the account shall be confined to the money actually advanced by the clients, the mortgagees, and the mortgage security cut down as to the other alleged parts of the consideration; and further, that the attorney shall not be allowed to take timber felled on the mortgaged estates in execution for his private debt, for that the timber is part of the security of the mortgagees, and the produce goes in discharge of the mortgage account. *Lewis v. Morgan*, 3 Anstr. 769. 5 Price, 42. 4 Dow. 29.

In *Piddock v. Brown*, 3 P. Wms. 288, Lord Talbot laid down this rule, that upon producing a bond or mortgage it is *prima facie* good evidence of a debt; but wherever there are manifest signs of fraud in the obligee, &c. in such case he ought to be put to proof of actual payment; and though he may happen thereby to lose some part of the money really due to him for want of being able to make sufficient proof, it is but a just punishment for the fraud, of which he appears to be guilty, and will be a proper discouragement to others from committing the like. This was relied on by Lord Thurlow, in *Vaughan v. Lloyd*, 5 Ves. 48, cited. But the great rule, said Lord Eldon, in a subsequent case was, that he who bargains in matter of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence; a rule, applying to trustees, attorneys, or any one else. *Gibson v. Jeyes*, 6 Ves. 278.

Where in mortgage accounts the mortgagee had charged commission for receiving the produce of a West India plantation mortgaged, when in fact he resided in England, Lord Rosslyn said, the act of the assembly of Jamaica would be waste paper, if the defendant could succeed, merely by calling himself not a mortgagee but an attorney, to entitle himself to all these charges for commission: it was unconscionable, and not allowable. *Chambers v. Goldwin*, 5 Ves. 838.

In a Scotch cause, the principle of which may be easily transferred to the courts in England, a law agent employed in his client's business, lent his money on a security, which eventually failed, through the negligence of the agent. It was held in the English House of Lords, that the agent was personally responsible for the loss, notwithstanding a lapse of twenty-five years acquiescence, and a settlement of his account, and a discharge by the client's representative, he continuing to act for his client, and it appearing that he had concealed from him the real state of the transaction, and had not communicated the insolvent situation of the parties with whom he had dealt on his client's behalf. *M'Donald v. M'Donald*, 1 Bligh. 315.

Where an attorney, having a deed of settlement in his possession for a particular purpose, delivered it over to a mortgagee, after having said in his answer that he was ready to produce it as the court should direct, he was held not guilty of a breach of trust; since he was equally a trustee for the mortgagee as for the mortgagor, who was only tenant in special tail, and no fine had been levied, or recovery suffered. A bill of discovery brought by the heir in tail was therefore dismissed. *Siddons v. Charnells*, Bunb. 298.

As to the client's bounty to his attorney, it was laid down, in *Wright v. Proud*, that, independent of fraud, an attorney shall not take a gift from his client while the relation subsists. 13 Ves. 138; et vide *S. L. Hatch v. Hatch*, 9 ib. 296; and generally, *Aubrey v. Popkin*, 1 Dick. 403. *Bellew v. Russell*, 1 Ball & Bea. 104. Antea, 124, of this edition, is *notis*. *Wood v. Downes*, 18 Ves. 120. and *Montesquieu v. Sandys*, ib. 304.

Attorney put to proof of payment of money lent.

Commission.

Attorney negligently lending client's money on defective security, responsible.

Attorney holds deeds as well for mortgagor as mortgagee.

Client's gift to attorney.

SECTION IV.

OF MORTGAGES OF PUBLIC STOCK.

Mortgages of stock.

PUBLIC stocks or funds are perpetual annuities, subject to redemption. They are a mere right; and the circumstance that government is the debtor makes no difference. They constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coined money, capable of possession and manual apprehension. *Wildman v. Wildman*, 9 Ves. 174. A very untechnical expression is commonly used with regard to stock, for literally there is no such thing as one hundred pounds stock; nevertheless, as in common parlance, people, speaking of stock, will so express themselves, the court will apply it. *Kirby v. Potter*, 4 Ves. 751. The lawfulness of a loan of stock was established, by *Sanders v. Kentish*, 8 T. R. 162.

Loan of stock viewed as sale.

A conditional transfer of stock, by way of loan, is viewed in equity as an absolute sale, on account of the risk to which such transactions are subject. Thus, in *Dennison, Ex parte*, 3 Ves. 552, a sum of 5000*l.* 3 per cent. reduced annuities, was transferred as a security for a floating balance, and under an agreement to continue it, transferred and re-transferred by the creditor by way of loan: but it was held to be a sale; 3 Ves. 553, et vide ante, p. 962, of this edition, as to the means whereby a mortgagee of stock may obtain payment of his money. The decision in *Dennison, Ex parte*, may be evaded by a transfer of the stock to trustees on special trusts, and such, it is conceived, is the proper mode of mortgaging an immediate interest in this species of property. See the Appendix, No. XXXVI.

Mortgagee selling must account for surplus.

If a mortgagee of stock takes advantage of the decisions in *Dennison, Ex parte*, and *Lockwood v. Ewer*, ante, 963, of this edition, text, he will be decreed to account for the surplus produced by the sale, after deducting his principal, interest, and costs. *Harrison v. Hart*, Com. 393. This case affords a striking illustration of the extent of the South Sea bubble. It appears that 20,000*l.* South Sea stock was transferred as a security for 70,000*l.* money and interest, and that the 20,000*l.* stock actually produced the sum of 86,291*l.* 17*s.* 8*d.* sterling. By the deposition of one witness, the defendant agreed to sell him 1000*l.* South Sea stock at 1000*l.* per cent. premium.—That the mortgagee selling stock, must account for the surplus after payment of the debt and costs, appears further established by the following case of *Thomas v. Puddlesbury*, Sel. Ca. Ch. 51; though certainly there arises an obvious inconsistency in saying that every mortgage of stock is an absolute sale, and then adding that the mortgagee is accountable as a redemption. On this however it must be recollected that *Dennison, Ex parte*, is the latest and ruling decision. In the case alluded to, A. was possessed of long Exchequer annuities for 99 years, which were settled on the husband for life, with remainder to the wife for life, with remainder for younger children's portions, and the husband obtained liberty, by decree of the court of Chancery, to borrow 500*l.* upon the security of these annuities, which was done, and the security placed in B., the lender's hands. B. subscribed the annuities into the South Sea stock, in 1720. A. brought his bill for reconveyance; and it was held, that B. had his security for a particular purpose only, and had no authority to subscribe; so he was decreed to account for the profits, and to convey, on payment of principal, interest and costs. Sel. Ca. Ch. 51.

Damages calculated at price of stock on day it should be replaced, not on day of trial.

On the subject of stock the following cases remain to be noticed. In *Forrest v. Elwes*, 4 Ves. 492, the defendant sold out 8000*l.* old South Sea annuities, and took a bond from Forrest to replace the stock at the end of six months, and for payment of legal interest on 7170*l.* (the produce of the sale) in the mean time. F. made default in replacing the stock; and the matter coming on in Chancery, when the value of the stock was very much depreciated, the Master of the Rolls allowed the claimants under *Elwes* to recover the money for which the stock was sold, with interest in the mean time at 5*l.* per cent. This case may be considered as decided on the particular circumstances of hardship attendant on the great depreciation of the value of the pledge, and cannot be advanced as an authority for a general rule, that under a similar proviso, the court of Chancery will decree a redemption on payment of the money instead of a transfer of the stock, in order to save the lender from a loss. In the same case, his Honor observed,

that if an action had been brought recently upon the breach of the agreement, and the stock had risen, the jury would, by way of damages, have given the rise, and would not have confined it. Accordingly, in a subsequent case upon a writ of enquiry to assess damages on a bond, the only question was, whether the damages should be calculated at the price of the stock on the day when it was to be replaced, or at the price of the stock on the day of the trial, the value of the stock having risen in the mean time? It was decided, that the plaintiff was entitled to recover the larger sum, being that which could alone indemnify him at the time the action was brought. *Shepherd v. Johnson*, 2 East, 211. So in *M'Arthur v. Seaforth*, 2 Taunt. 257, it was held, that on a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the plaintiff, but not as it should seem at the highest price on any intermediate day. In this case, the plaintiff gave a bond, conditioned to replace 5 per cent. stock on a given day; after that day, government gave the holders of stock agreed to be replaced, an option to be paid off at par, or to commute their stock for 3 per cents. The plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take 3 per cent. stock. On which it was held, that he was not entitled to recover the price of so much 3 per cent. stock as he might have obtained in exchange for the 5 per cents. Hence it is in the power of the lender, after a default once made, to take advantage, by hastening or delaying his suit, of the rise in the market, without any risk in case the market falls. This inequality was in one case urged against assessing the damages at the value of the stock at the time of the action brought; but Grose, J. observed, that it was no answer to say that the defendant might be prejudiced by the plaintiff's delaying to bring his action; for it was his own fault that he did not perform his engagement at the time; or he might replace it at any time afterwards, so as to avail himself of a rising market. *Shepherd v. Johnson*, 2 East, 212.

If a mortgage be made upon a loan of stock, to secure a re-transfer, and the mortgagor becomes bankrupt, the mortgagee will be entitled to prove for such dividends as became due before the bankruptcy, and for the stock according to its value at the date of the commission. *Day, Ex parte*, 7 Ves. 301. And where stock was secured by bond and the collateral security of real estate to be replaced at the end of three years, and in the mean time the dividends to be paid as they accrued due, and the dividends were not regularly paid, and before the expiration of the three years the obligor became bankrupt, it was held that the obligee was entitled to have the proceeds of the sale of the real estate immediately laid out in the purchase of stock, without waiting the expiration of the three years. *Fisher, Ex parte*, 1 Buck. C. B. 188. S. C. 3 Madd. 159.

A loan made for the purpose of enabling a party to pay or compound differences upon illegal stock-jobbing transactions, is in itself illegal; and all securities given for repayment of the money are void, even though the lender were no party to the transaction. And where one of two partners had sustained losses by stock-jobbing speculations, and his other partner had joined with him in a bond to secure a loan made by a third person for the purpose of meeting such losses, it was held, that it not being a debt to which the partnership was liable, the loan being illegal, and the security void, it was not competent for one partner, after an act of bankruptcy by the other, to dispose of the partnership property in discharging such a security, and the assignees were entitled to recover back money so had and received. *Cannan v. Bryce*, 3 Barn. & Ald. 179. And see *Aubert v. Maze*, 2 Bos. & P. 371, over-ruling the distinction taken between *malum prohibitum* and *malum in se*, in the cases of *Faikney v. Reynolds*, 4 Burr. 2069; and *Petrie v. Hannay*, 3 T. R. 418. S. C. 6 ib. 407. cited, et vide *Langton v. Hughes*, 1 Mau. & S. 594.

Where a person obtained an equitable interest in a sum of money on mortgage by virtue of covenants in a marriage settlement, and such money was afterwards converted into exchequer bills, and finally invested with other monies in the funds; it was held, that the *cestui que trust* was entitled to so much of the stock as was proved to have been purchased with the mortgage money, and was not to be postponed to a subsequent assignee of the whole stock, merely because he acted as the attorney of his trustee in the transfer and investments. *Liebman v. Harcourt*, 2 Meriv. 513.

An agent or attorney, having power to sell, assign, and transfer stock in the public funds, cannot transfer it under the power by way of mortgage. If he does, the mortgagee, having notice of the power, will be decreed

Effect of borrower's bankruptcy.

Loan connected with stock-jobbing, illegal.

Stock liable to same trusts as purchase money.

Power of attorney.

Loans connected with stock certain, not contingent, transaction usurious if more than 5 per cent. taken.

to re-transfer it, to repay the dividends he may have received, and to pay the costs of suit. But it would be otherwise if the mortgagee had no notice of the power, and this, it seems, it would be very easy for the agent or attorney to prevent, by first selling the stock into another name, and then buying it back in his own. *Debouchout v. Goldsmid*, 5 Ves. 211.

In addition to the observations made antea, 895, of this edition, in *notis*, as to usury connected with loans of stock, it may be here further remarked, that where the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certain and nothing contingent, the transaction will be usurious if more than 5 per cent. be taken. Thus in ejectment to recover possession of mortgaged premises, it appeared that the mortgage was made upon a selling of stock. The mortgagor had applied for money to the mortgagee, who told him that all his money was in the funds, and that to sell out stock at that time would be a considerable loss to him, stock then standing at 73; but that if he would take it at 75, he should have the sum he wanted. The mortgagor consented to this, and received 1500*l.* in stock valued at 75; this he sold the same day, when the current price of stock was 72½ by which he lost between 50 and 60*l.* Upon proof of these facts, Lord Kenyon held the transaction usurious, and nonsuited the plaintiff. *Doe v. Barnard*, 1 Esp. N. P. C. 11. So in *Boldero v. Jackson*, 11 East, 612, the plaintiff had made advances to the defendants, and credited them with 25,000*l.* at a time when the 3 per cents. were at 50; in consideration of which, in October following, when the 3 per cents. were at 51½, he undertook to purchase the sum of 50,000*l.* in their names, and to account for the dividends thereon from Midsummer-day then last,—it was allowed on all hands that this was usury.

So, it seems, what are called continuation contracts are usurious. *Smedley v. Roberts*, 2 Campb. 607, et vide Com. Usu. c. 2. sec. 9. That dividends on stock are not apportionable like the interest on a mortgage, see *Rashleigh v. Master*, 3 Bro. C. C. 100. *The King v. Churchwardens of St. John*, 6 East, 184. et antea, 943, of this edition, text.

SECTION V.

OF COPYHOLD MORTGAGES.

Ancient mode of mortgaging.

FOR the general economy of a mortgage of copyholds, see antea, 433, of edition, in *notis*. The ancient mode of mortgaging a copyhold estate was this:—The mortgagor surrendered into the hands of two customary tenants the copyhold premises to the use of the mortgagee, upon condition to be void, if the money were paid on a day specified. To avoid the fine to the lord, this surrender was not presented at the next court, but after that court was over a new surrender was made into the hands of two other customary tenants, ut supra, and so from time to time, as often as any court should be held; but such non-presentation was at law a forfeiture; and Lord Keeper North, in an anonymous case in *Skin*. 142, pl. 13, refused specific performance of such a contract, which caused this troublesome mode of mortgaging to fall into disuse.

Modern mode, & consequence.

At the present day mortgages of copyhold estates are generally effected by a deed of covenant to surrender the premises to the use of the mortgagee, with a proviso, that on payment of the money the surrender shall be void. The deed should also contain a covenant for payment of the money, and covenants for the title. When the surrender is made, the surrender and condition should be both entered on the rolls, the entry of the condition to follow immediately the entry of the surrender. 1 Watk. Cop. 182. 2d edit. If the repudiated mode of inserting the condition in a separate deed be adopted it should nevertheless be entered on the rolls; for if the deed be lost, the proof of the condition might be difficult, and frequently impossible, ib. 183. In case the money is paid at the day the mortgagee acknowledges the repayment and authorizes the steward to vacate the surrender. Such acknow-

ledgment of satisfaction, the warrant to vacate, and the actual vacation of the surrender, are then entered on the rolls; on which the surrenderor becomes possessed of his former estate, and is in *status quo prius*, without any re-admission or fine, although the mortgagee may have been admitted; Glib. Ten. 276. *Simmonds v. Lawnd*, Cro. Eliz. 239. If the surrender has not been presented according to the custom of the manor, no notice need be taken of it on the rolls. *Fawcett v. Lowther*, ubi infra. But if the condition be broken, and the surrenderee be admitted, whereby an equity of redemption only remains in the surrenderor, then his re-admittance will be necessary, *Fawcett v. Lowther*, 2 Ves. 300; and a fine will be incurred, 1 Watk. 190; which admission will break the line of descent of an estate taken from a maternal ancestor. *Roe v. Baldware*, 5 T. R. 104. *Martin v. Strachan*, Willes, 444. *Benson v. Scott*, 12 Mod. 49. *Doe v. Morgan*, 7 T. R. 103. As to entry of satisfaction, the condition is express, that on payment of the money the surrender shall be void. On payment therefore, within the prescribed time, the surrender becomes void *ipso facto*, and an acknowledgment of satisfaction by the mortgagee is now usually entered (regardless of the above formal mode) on the margin of the roll immediately against the surrender, which is signed by the surrenderee, and this is clearly sufficient when the money is paid at the day. But the same mode of discharging a mortgage is also adopted when the day is past, if the money be paid at any time before admittance; yet, says Mr. Scriven, there is an evident irregularity in so doing, after the condition is forfeited, 1 Scriv. Cop. 246, n. (187.) 2d edition.

When a mortgage is forfeited, the equity of redemption descends to the customary heirs or sequels of the surrenderor, as the legal estate would have done; *Fawcett v. Lowther*, 2 Ves. 300. In which case a question arose, whether there could be an escheat to the lord of the equity of redemption on a copyhold mortgage. Lord Hardwicke said it had never been determined nor should he determine it then: though it was a considerable argument, that, if otherwise, there would be an end of escheats, because all the lands in England would soon be in trust, yet that was contrary to the old doctrine, 2 Ves. 304. On the subject of equitable escheats, see ante, 252, of this edition, n. (G), and further, Belt's Supp. to Ves. sen. 348-9. *Williams v. Lonsdale*, 3 Ves. 752-6. and Scriv. Cop. 465, n. 27, 2d edition. An equity of redemption of copyholds has been said to be a *freehold* interest, for that it will pass by release alone, without surrender, see 1 Bar. Prec. 349. n. (2) 1st edition, referring to 1 Watk. Cop. 60. But Mr. Watkins does not call it a freehold interest, he merely says, that it may be assigned or devised without a surrender, and it cannot without a considerable sacrifice of principle be so denominated. Therefore a bargain and sale of an equity of redemption of copyholds is not the most formal assurance, though a deed is certainly essential; for, after admittance of the surrenderee, the equity of redemption cannot properly be extinguished by a surrender, unless indeed such surrender might possibly be held to operate as a release. Then a question may arise whether, on such surrender operating as an assurance of a *quasi* freehold interest, a fine to the lord will accrue. It is settled, that on a release of the equity of redemption by deed no fine will be incurred; *Hall v. Sharbrook*, Cro. Jac. 36; and by a parity of reason no fine should be payable in the instance supposed. An equity of redemption in copyholds will pass by the will of the mortgagor without a surrender to the use of such will, *Macnamara v. Jones*, 1 Bro. C. C. 481; *Gibson v. Stiles*, 9 Mod. 267, ante, 433, of this edition, in *notis*, provided the mortgagee be admitted, for otherwise a surrender to a mortgagee, who has not been admitted, will not make a surrender by the mortgagor to the use of his will unnecessary: *Kenebel v. Scriffton*, 8 Ves. 30; *Doe v. Wroot*, 5 East, 132. Whether a surrender to the use of a will is valid and subsisting, notwithstanding a subsequent surrender to a mortgagee who has not been admitted, has not yet been decided. Mr. Sugden thinks it quite clear that it would be held good, because the surrender to the mortgagee does not pass the estate out of the surrenderor before admittance, nor can the last surrender, as in the case of a sale, be deemed an absolute revocation by operation of law of the first surrender; and it is not denied, that a man may, after a surrender to the use of his will, surrender to a stranger without any express revocation of the former surrender; *Fitch v. Hockley*, Cro. Eliz. 441. "But it does not therefore follow," continues the learned writer, "that a surrender to a mortgagee is of itself a revocation of the prior surrender; on the contrary, as such a surrender does not preclude the necessity of a subsequent surrender to a

Potentially in assignees till bargain and sale from commissioners to purchaser.

Priority of surrender.

On breach of condition, lord may insist on mortgagee's admission. Sed. qu.

Mortgagee may foreclose before admittance.

Sugden's Act supplies formal, not substantial, surrenders.

will, where there is no prior one, it would seem that it has only a partial operation, which leaves the prior surrender untouched, and precludes the necessity of another surrender for the same purpose." *Gilb. Uses*, 74. Sug. n. (5) 3d. edition. A doubt has been suggested, as to the power of excepting copyholds in the assignment from commissioners of bankrupts to the assignees chosen by the creditors, the act of 5 Geo. 2. c. 30. s. 26, having provided that the commissioners shall assign "every such bankrupt's estate and effects" unto the persons chosen assignees by the creditors, 2 Mont. Bankr. Laws 130. 131. But this doubt has been removed by the case of *Holland, Ex parte*, 4 Madd. Rep. 483, where it was held, that a good title to a leasehold estate can be made by bargain and sale from the commissioners to the purchaser without an assignment to the assignees, et vide *Scriv. Cop.* 362. But though excepted in the bargain and sale, the equity of redemption, till assignment, is potentially in the assignees. *Lloyd v. Lander*, 5 Madd. 288. S. C. antea, p. 971, of this edition, n. (N).

The mortgagor may, in the mean time, and until the admittance of the mortgagee, make a second surrender, which will be good, if the first surrender be not perfected by admittance. Thus, in *Burgoyne v. Sparling*, (Cro. Car. 273. 283, 284. S. C. Sir W. Jo. 306.) A. surrendered copyhold lands into the hands of customary tenants, to the use of B. in fee, on condition to be void if A. paid B. a certain sum on the first of July following; and afterwards, before payment of the money, A. surrendered by the hands of customary tenants to C. in fee, and then paid the money according to the condition, and surrendered in like manner to D. in fee, and the surrender to D. was presented at the next court; and subsequently, at the same court, the surrender to C. was presented; but the conditional surrender to B. was not presented; it was adjudged that C. should have the land. Et vide further as to priority between a mortgagee and annuitant. *Wilson v. Stafford*, Amb. 181.

Where a conditional surrender was forfeited, and it was desired that the old surrender should be taken up, and a new one made, but the lord insisted that the mortgagee should be admitted and pay a fine, and caused proclamations to be made for that purpose, the court of Chancery refused to interfere, except to direct an issue to try the question, whether the lord was bound by custom to accept the second surrender. *Tredway v. Fotherley*, 2 Vern. 367. But Mr. Watkins questions the authority of this case, on the ground that the lord cannot compel the surrenderee to be admitted without special custom, and that a mortgagee may bring his bill of foreclosure before admittance. 1 Watk. Cop. 189, citing, for the former position, *Baspool v. Long*, Cro. Eliz. 879. S. C. Yelv. 1., [1 Roll. Abr. 568. 1 Show. 30. 83. Et vide *King v. Dilliston*, 1 Salk. 386. S. C. Carth. 41.] and for the latter, *Sutton v. Stone*, 2 Atk. 101. In *Fawcett v. Lowther*, 2 Ves. 302, Lord Hardwicke said, the general custom of copyholds was, for the surrenderee to come and have the matter presented at the next court; but there were several manors where the tenant need not come under three courts, and such custom was good, 2 Ves. 302. By special custom, the surrender may be presented at any subsequent court, *Moore v. Moore*, 2 Ves. 602.

The statute 55 Geo. 3. c. 192, (an act to remove certain difficulties in the dispositions of copyhold estates by will,) extends only to supply surrenders in form, and not surrenders in substance. Therefore, where a feme covert omitted to surrender to the use of her will, it was held that this was not a case within the statute. *Doe v. Bartle*, 1 Dow. & Ry. 81. S. C. 5 Barn. & Ald. 492. The reasoning which induced this adjudication was, that the customs of the manor enabled a feme covert to pass by her will copyhold lands, which had been surrendered to the use of such will by the husband and wife jointly, the wife, on that occasion, being examined by the steward separate and apart from her husband, and consenting. Now, the object of the statute was to prevent any inconvenience arising from a mere omission to surrender in the case of an adult legally capacitated. But where a private examination was an essential part of the surrender, the legislature never intended to cure an omission in that important particular: such an extension of the statute would be pregnant with the most serious consequences. The rule of construction laid down by Lord Coke, 2 Inst. 386, was exactly applicable, that if a case be out of the mischief intended to be remedied by the statute, it should be considered to be out of the purview, although it might be within the words; and the court was quite

satisfied that this case was out of the mischief intended to be remedied, *Ib.* 90 & 501.

A contract or agreement to surrender copyholds, or a surrender which is void for want of presentment in due time, will be enforced in equity in favour of a purchaser or mortgagee against the heir or widow of the mortgagor, or the person next in succession, where the estate is of inheritance, or the first life in a copy has a power to dispose of the estate; *Davies v. Beardshaw*, 1 Ch. Ch. 59. S. C. 3 Ch. Rep. 4. Nels. Ch. Rep. 76. 2 Freem. 157. 9 Mod. 75. *Barker v. Hill*, 2 Ch. Rep. 218. *Bradley v. Bradley*, 2 Vern. 165; and against a devisee (though a child of the testator) or a volunteer, *Martin v. Seamore*, 1 Ch. Ca. 170; or the assignees under a commission of bankrupt, *Taylor v. Wheeler*, 2 Vern. 564. S. C. 2 Salk. 449. 10 Mod. 492. 2 Ves. 653 (and see *Bartlett v. Tutchin*, 6 Taunt. 259); or a surviving joint tenant, *Hinton v. Hinton*, 2 Ves. 631. In *Pattison v. Thompson*, Finch. 272, A. mortgaged freehold and copyhold lands to B., and A. agreed to surrender the copyhold estate, but died before it was perfected. It was decreed that the heir of A., when of age, should make a sufficient surrender nisi causa within six months after his attaining 21. So in *Keen v. Sparrow*, *ib.* 331, a surrender was decreed, the mortgage being of copyhold lands, by deed, without any agreement to surrender.

Agreement to surrender binding, on whom.

If a lord of a manor mortgage the manor in fee to A., and afterwards purchases copyholds held of the manor, and takes surrenders of them to himself in fee, they will enure to the benefit of the mortgagee; and a settlement by the lord of all his estate mortgaged to A., will pass the equity of redemption of such surrendered copyholds. *Doe v. Pott*, 2 Doug. 710. In the same case it was held, that if a mortgagor devise the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate to a trustee in trust for the mortgagor, such a transfer of the legal estate will not operate as a revocation of the will. *Ib.*

Mortgage of manor by lord.

Where a surrender was in these words:—"To the use and behoof of the parish church and chapel of Saint Pancras, in and about repairing the same, and otherwise for the benefit thereof," it was held that the trustees might apply the rents and savings of the premises in question to the reparation of the church, but could not mortgage; and they were enjoined from raising money on the premises by fines for long leases, or by mortgages, or otherwise, accordingly. *Attorney-General v. Foyster*, 1 Anstr. 116.

Power to mortgage not included in trust to repair or otherwise.

A mortgagee not being tenant until admittance, cannot in the mean time pass the lands by surrender. If he make a surrender, it will be merely void; but he may make an equitable transfer, and compel the lord to admit his assignee by *mandamus* without a double fine. *King v. Hendon*, 2 T. R. 484. The mortgagee may also devise the lands, and they will pass in equity. *Davis v. Beversham*, 3 Ch. Rep. 4; but the devisee will not be entitled to admission as legal tenant; for a legal devise of copyholds cannot be made before admittance. *Doe v. Tyfield*, 11 East, 246. And therefore, although the devisee be admitted, the surrenderor, or his heir, will still remain tenant to the lord. But equity will consider the legal tenant to be a trustee for the devisee. The proper course to be pursued, probably, would be for the heir of the mortgagee to be admitted, and to make a surrender to the devisee. In a recent case it was held, that the devisee (who had been admitted) of a devisee who had died without admittance, could not maintain ejectment as the legal tenant. *Doe v. Vernon*, 7 East, 8. A person who has mortgaged a copyhold estate, is not a competent witness in an ejectment concerning it; for the equity of redemption still resides in him. *Anon.* 11 Mod. 354. The admittance of the mortgagee relates back to the time of the surrender. *Vaughan v. Atkins*, 5 Burr. 2785. From this doctrine it follows, that the surrenderer may, in ejectment, after admittance, lay his demise in the interim between the admittance and surrender, and recover meane profits from the time of the surrender. *Holdfast v. Clapham*, 1 T. R. 600. *Roe v. Hicks*, 2 Serj. Wils. 15.

Mortgagees may assign and devise before admittance.

As the mortgagor remains tenant to the lord until the admittance of the mortgagee, the copyholds will, on his death, descend on his customary heir, and a heriot will become due. *Forsel v. Walsh*, Cro. Jac. 403. If the heriot be paid, and the heir claim to be admitted, Mr. Watkins makes a quære whether, inasmuch as the admittance of the mortgagee, or his heir, always relates to the time of the surrender, so as to avoid all intermediate rights and interests contrary to the surrender, (such as the free bench of the surrenderor's widow and the like, (*Benson v. Scott*, 1 Salk. 185, *Vaughan v. Atkins*, 5 Burr. 2785.) a heriot will not, on such admittance, become due,

Ejectment.

Heriots.

as if the surrenderee had died seised, and if so, whether the lord ought not to return the first heriot? 2 Watk. Cop. 158. 2d edition. This question remains undecided.

Waste.

Finally, it is observable, that a mortgagee of a copyhold estate may pull down ruinous houses, and build better, to prevent a forfeiture: and that a surrender by a mortgagee of copyholds to the use of his will, is no proof that he considered it irredeemable. *Hardy v. Reeves*, 4 Ves. 480.

SECTION VI.

OF MORTGAGES OF COLONIAL PROPERTY.

Commission not allowed to mortgagees, acting as consignee of produce of West India estates mortgaged.

COURTS of justice in England apply to the relation of mortgagor and mortgagee upon West India mortgages all the principles that exist as to that relation here, except where particular laws, or the usages of the different Islands, demand a contrary or varied administration. 9 Ves. 271. By the laws of the assembly of Jamaica, (Act 1740), mortgagees in possession are declared not entitled to any commission, except what is paid to the factor for his commission; and in case any greater commission is demanded, a penalty of 100*l.* for every offence is imposed, with a proviso, that it shall not extend to commission for the sale of negroes and other commodities sent to the Island. 9 Ves. 268. On this Lord Eldon observed, that he had formed an opinion how far mortgagees were entitled to commission while resident in the Island; but he had some difficulty in declaring that opinion, lest he should prejudice the question. But his Lordship was clear, that the mortgagee while resident in England, could not charge commission either according to the laws of the Island, or on a due interpretation of the mortgage contract. *Chambers v. Goldwin*, 9 Ves. 273. *S. C.* 5 Ves. 834. et antea, 954, of this edition, n. (O). In *White v. Hall*, 12 Ves. 321, the court held, that it had no authority to set aside a foreclosure and judicial sale of an estate in the colonies, obtained under the process and judgment of a court having competent jurisdiction, not only intrinsically, but under the acts of the parties. It therefore refused the injunction prayed.

Covenant in mortgage-deed, that mortgagee shall be consignee, void as usurious.

The old practice of mortgaging in the Island of St. Vincent, was to insert a covenant from the mortgagor to consign his produce to the mortgagee during the continuance of the mortgage; but this has lately been held to be a usurious covenant, securing to the mortgagee more than six per cent as allowed by the statute 14 Geo. 3. c. 79. It was then doubted whether the deed was not good *pro tanto*, as the specific independent covenant might be rejected *in toto* without interfering with the remainder of the deed; but in the case alluded to, deeds, containing such a covenant, were declared usurious and absolutely void, on the ground that the agreement appeared to be part of the consideration for the loan, which could not be separated from the entire contract. *Whitfield v. Sayers*, 1818, Court of Chancery, St. Vincent. Shep. Col. Pra. 125. Mr. Shepherd adds, "It is now the universal practice to omit this stipulation, and yet it is always tacitly complied with; because the produce must be shipped, and the planter will naturally ship it to his own correspondent, in liquidation of the advances he is under to him, in preference to a stranger; and thus usury may be said to exist in every mortgage between an European merchant and West India proprietor. "The policy of this construction," the learned writer continues, "may be subject to considerable doubts; for if the covenant were continued, it would only compel the planter to pay his debts, which no honest man ought to object to; but the omission of it enables the profligate to ship his produce to other persons than his mortgagee, and to dispose of the proceeds; thereby defrauding the merchant of the very consideration on which he advanced his money." Shep. Col. Pra. 126. This case seems adverse to the observations of Lord Eldon in *Bunbury v. Winter*, 1 Jac. & Walk. 261, where a party becoming surety for a West India merchant for a debt to the crown, procured a conveyance of a plantation estate as an indemnity, with covenants appointing him consignee, and that he should continue to have the consignments for five years after his liability ceased; the court could

not consider the deed so oppressive as to interfere upon motion for a receiver, and refused the motion accordingly, with costs, 1 Jac. & Walk. 255; on which occasion the Lord Chancellor is reported to have used the observations *antea*, 305, of this edition, note (E), sec. xiii.

West India mortgages are almost always for a floating debt: a security given for a certain sum, which is to cover what may be the balance, per Lord Loughborough, 4 Ves. 126. Lord Northington has said, that in his time every body knew the difficulty of obtaining possession under a mortgage in the West Indies, though that difficulty did not exist on a purchase. 2 Eden, 114. Whether any objection arises to a mortgage of colonial property on this head at the present day, the Editor has not been able to ascertain; but though he can conceive it to be not the most eligible security for a mortgagee, yet he is not aware of any violent objection, further than the risk of seas and the chance of war, to the loan of money on the mortgage of colonial property. A form of such mortgage will be added in the App. No. XXXVII.

Colonial property, ineligible security.

It merely remains to observe, that letters of administration of an Intestate's effects in India, the proceeds of which have been remitted to England, will prevail over an administration in England, *Currie v. Birchem*, 1 Dow. & Kyl. Rep. 35.

SECTION VII.

MORTGAGES OF SHIPS.

A TRANSFER of a ship at sea to a vendee resident in the port in which the ship is registered, will not be available, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale. *Richardson v. Campbell*, 5 Barn. & Ald. 196; et vide *S. L. Moss v. Charnock*, 2 East, 399. *Hubbard v. Johnson*, 3 Taunt. 206, and *Palmer v. Maxham*, 2 Mau. & S. 43. In a bill of sale of a ship, the net setting forth the true consideration, and want of proper stamp, though they subject the parties to a penalty, do not avoid the instrument. *Robinson v. M'Donnell*, 5 Mau. & S. 234. And it should be remembered, that in equity, relief cannot be had to cure a defective assnurance for want of compliance with the strict regulations of the Registry Acts (cited *antea*, n. (G) p. 25, of this edition) as in other cases; *Speldt v. Lechmere*, 13 Ves. 589; and fraud is no exception, 1 Madd. Rep. 400; though in a recent case the Lord Chancellor is said to have expressed a doubt, *ib.* 406. But a declaration of trust will not, it seems, vitiate the legal effect of the bill of sale, if the requisites of the statutes are complied with. *Heath v. Hubbard*, 4 East, 110. A bill of sale, with a stipulation that it was made as a lien or security for money lent, and that the vendee might sell and transfer, has been held to be a contract, not of lien but of mortgage or pledge. *Wilson v. Heather*, 5 Taunt. 642. And an instrument under seal, executed by the master, (who was also owner) for the re-payment of money borrowed for repairing the vessel, thereby stipulating that the vessel should be and remain a security by way of bottomry for the re-payment thereof, and that as well his executors, &c. as the said vessel, should be bound in the penal sum of so much, has been decided to operate as a mortgage of the vessel; so that the party may take possession; after which, his right will not be defeasible by a subsequent execution at the suit of another creditor. *Ladbroke v. Crickett*, 2 T. R. 649. It has also been determined, that there can be no title in a ship arising by implication in equity on acts between the parties; that the register is conclusive evidence of the property even between joint and separate creditors; and that parol evidence is not admissible in equity to shew that the money was advanced out

General rules as to transfer of property in ships.

of the joint concern. *Yallop, Ex parte*, 15 Ves. 60. *Houghton, Ex parte*, 17 Ves. 251. *Curtis v. Perry*, 6 Ves. 739. *Jones, ex parte*, 4 Mau. & S. 450.

Doubt concerning mortgage of ships removed.

It was once thought there could be no valid mortgage of a ship, and it was said that no instance had occurred of a mortgage of a ship since the Registry Acts. The Vice Chancellor, in a late case, felt surprised at this assertion; observing, that he was much struck when he heard that mortgages of ships depended merely upon honour; for that, before the Registry Acts, ships were mortgageable, and there was nothing in the spirit or letter of those acts to confine the transfer to an absolute sale, 1 Madd. Rep. 395. In confirmation of this remark, it is observable, that in *Hibbert v. Rolleston*, 3 Bro. C. C. 571; and in *Mentzer v. Gillespie*, 11 Ves. 696, ships were mortgaged, and no objection taken to the security on the above ground. So in the late case of *Wilson v. Heather*, 5 Taunt. 642, the court considered the mortgage of a ship as valid, provided the forms required by the Registry Acts were attended to. In like manner, in *King v. King*, 3 P. Wms. 360, mention is made of a decree of Lord Harcourt on the mortgage of a ship at sea, where the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. Difficulties, it is said, are raised by the custom-house officers refusing to register a mortgage, that species of transfer being incompatible with the form prescribed by the act. The Vice Chancellor, in the case alluded to, made enquiries on this head of the custom-house officers, and reported, that a very strong notion seemed to have prevailed with them, as with the profession, that considerable difficulties occur in the way of mortgaging ships in consequence of the prescribed form of indorsement in the 34 Geo. 3. c. 68. s. 15, which is adapted only to a total and absolute sale, and will not apply to a transfer by mortgage, the mortgagor not being properly within the term "seller" nor can he truly declare, that he has "sold all his right, share or interest, in and to the ship or vessel," nor is the mortgage properly a purchaser. The consequence (continued his Honour) was, that mortgages of ships had sometimes been made by two instruments:—one an absolute conveyance of the ship, the other a deed of defeasance; the former only being registered at the custom-house. This course, however, was founded in mistake. There was no doubt that the power of mortgaging a ship existed as fully since the Registry Acts as it did before, provided the requisites prescribed by the act were observed, and there was no difficulty in effecting this. Sir T. Plumer then pointed out the regular mode of making a mortgage of a ship in the following words:—

Mode of mortgaging ship prescribed.

"The mortgage should be made by the usual bill of sale of the ship, containing, in the same instrument, a defeasance or condition of re-transfer on payment of the mortgage-money. The bill of sale must contain the recital of the certificate, as the act directs, and must be fully indorsed on the certificate of registry, if the ship be in port; or if at sea, a full copy of it must be transmitted to the custom-house. The form of indorsement will be the one prescribed by the act, but with the addition of the defeasance, to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the act was sanctioned by the court of Common Pleas, in the case of a partial transfer of the interest in a ship. *Underwood v. Miller*, 1 Taunt. 387. And an ingenious living writer, (the present Lord Chief Justice of the King's Bench, in his *Treatise on Shipping*, p. 44), has well observed, that the acts seem to require a similar deviation in the case of a mere contract for the sale of a ship, which the act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the act must be adopted to make form give way to substance. In the subsequent forms to be observed at the custom-house, the defeasance will probably not be noticed, either in the entry indorsed, or the oath, or in the memorandum made in the book of registers; but adhering simply to the form prescribed by the act, it will be registered as an absolute bill of sale. But neither the mortgagor nor mortgagee can suffer by that omission. The statutes invalidate the transfer only in the event of a neglect of the prescribed requisites by the parties, not for any mistake or neglect by the public officers; and, in the event of any dispute of the title in a court of justice, the proper evidence of title will be the original documents themselves, not any imperfect abstract made of them at the custom-house. By that abstract, the mortgagee will, it is true, appear

the sole and absolute owner, and so he is, *pro tempore*, till redemption; but the mortgagor's right to call for a re-transfer will appear from the bill of sale fully indorsed on the certificate, if the ship be in port, or if at sea, by a full copy transmitted to the custom-house. It is a mistake to suppose that the owner of a ship cannot make any transfer of property without parting entirely and irredeemably with all his interest." *Thompson v. Smith*, 1 Madd. Rep. 393. 413.

A mortgagee of a ship cannot, in his own name, recover any of the earnings of the ship, accrued due while the mortgage is in possession. *Chinnery v. Blackburn*, 1 H. Bl. 117, n. The action in this case, said Lord Mansfield, must have been founded on the idea, that the mortgagor in possession was the servant and agent of the mortgagee, which was not the case; for, till the mortgagee took possession, the mortgagor was owner to all the world; he bore the expences, and he was to reap the profits, *ib.* Hence, the necessity of a power of attorney, enabling the mortgagee to recover any part of the earnings of the ship made in consequence of contracts with the mortgagor. How far a mortgagee of a ship, not in possession, will be liable for supplies and necessities furnished to the ship, is a point that has been much disputed. It was alluded to in *Westerdell v. Dale*, ante, p. 183 of this edition, as also in *Martin v. Parton*, 1 Holt on Ship. p. 354, *Annett v. Carstairs*, 3 Camp. 354, and *Twentyman v. Hart*, 1 Stark. 366. But these cases were contradictory; and it was thought at least possible, that when the point should receive a solemn determination, the mortgagee might be held chargeable for the expences of the ship from which he had been led to expect his security. Abbott on Ship: part 1, chap. i. sec. 14. This conjecture seems verified; for mortgagees of a ship, having their names inserted in the registry, (and without which their security could not be effected) have been held liable to creditors in respect of stores supplied for the use of the ship; and the possession of one owner has been decided to be the possession of all. *Machel, Ex parte*, 1 Rose, 447. Vide etl. *Jackson v. Vernon*, 1 H. Bl. 114. *Young v. Brander*, 8 East, 10. *Trewhella v. Rowe*, 11 East, 435. *Frazer v. March*, 13 ib. 238, and 2 Camp. 517. Lastly, it may be useful to subjoin, that the register alone is not even *prima facie* evidence to charge a person as owner of a ship, in a suit between private individuals, *Frazer v. Hopkins*, 2 Taunt. 5; nor is the bill of sale, unless it appears to have been accepted by the assignee. *Tinkler v. Walpole*, 14 East, 226; et vide *Cooper v. South*, 4 Taunt. 802, and *Pirie v. Anderson*, *ib.* 652.

Mortgagees not entitled to profits till in possession, but liable for stores from time of registry.

SECTION VIII.

OF THE STATUTES MERCHANT AND STAPLE.

THE mercantile securities of statute merchant, statute staple, and recognizance, are now nearly superseded by the more prevalent mode of mortgaging by way of conditional alienation. Nevertheless it may fairly be expected in a work of this nature, that some mention should be made of these nearly obsolete forms of security. A statute merchant, then, is a bond on record, provided by the 13 Edw. 1. stat. 3. c. 1. which enacted, that a merchant who would be sure of his debt might cause his debtor to come before the Mayor of London, or some chief warden of the city, and one of the clerks that the king should thereto assign, who should acknowledge the debt, and the day of payment; that this acknowledgment should be enrolled by one of the clerks, the roll to be double, whereof one part should remain with the mayor, the other with the clerk; that one of the said clerks should write an obligation, to which the seal of the debtor should be put, together with the king's seal. If the debtor did not pay at the day limited, all his lands should be delivered to the merchant, to hold to him until such time as the debt were wholly levied; and the merchant should have such seisin in the lands and tenements delivered to him or his assigns, that he might maintain a writ of novel disseisin if he were ousted. An obligation under this statute has obtained the name of a pocket judgment, for that on failure of payment on the day assigned, execution might be awarded, without any mesne process to summon the debtor, and without the trouble

Statute merchant.

or charges of producing evidence to convict him. Bac. Abr. Ex. 689. On this act it has been held, that a material variation in perfecting the security from the form prescribed, will render the statute-merchant void, and that the party may be relieved in a writ of *audita querela*, 2 Saund. 69 a. n.; but although void as a statute, it may be still good as an obligation, being under the seal of the debtor. *Hollingworth v. Asme*, Cro. Eliz. 355. 461. 494. But it has also been held, that the omission of an immaterial circumstance will not vitiate it, such as the omission of the day of payment, for then the debt will be deemed to be paid presently (Sir W. Jo. 52. Bridgm. 19.), or if the enrolment be written by the servant of the clerk, and not by the clerk himself, or the like. Winch. 83.

Statute-staple.

In the reign of Edw. 3. it was thought expedient to appoint certain towns where a fair of the staple commodities of the kingdom (such as wool, leather, fells, and lead,) might be held for the trade of foreign merchants. To protect them in that exclusive branch of traffic, the statute of staples (27 Ed. 3. stat. 2.) made it felony for any English merchant to export the staple commodities of the realm. It also authorized the mayor of the staple to take recognizances of debts made before him in the presence of the constables of the staple, or one of them, and declared that each staple should have a seal kept in the possession of the mayor under the seal of the constables, and that each obligation made on such recognizances should be sealed with the seal of the staple,—that the mayor might take the body of the debtor and commit him to prison, if found within the staple, until he made agreement for the debt and damages, and that he might seize the goods of the debtor within the staple, and deliver them to the creditor on a true appraisement, or sell them and deliver the money to the creditor; and if the debtor was not within the staple, nor goods to the amount of the debt, the same should be certified into Chancery, under the seal of the staple on which a writ should issue to take the body of the debtor and his lands, tenements, and goods, and the writ should be returned with the value of the lands and goods, and due execution should be made from day to day in like manner as in the case of a statute-merchant.

Recognizance in nature of statute staple.

This statute being found convenient, it was by connivance soon extended to merchandize not within the staple; to suppress which, and yet to give the creditor a similar security, the statute 23 Hen. 8. c. 6. provided the *recognizance in the nature of a statute-staple*, enabling the Justices of the King's Bench or Common Pleas, the mayor of the staple of Westminster, or the Recorder of London to take recognizances of any debt which should be sealed with the seals of the debtor, of the king, and of the person before whom it was acknowledged and enrolled, and whereupon the same advantage might be had as upon a statute-staple.

Recognizance at common law.

Recognizances by the common law are obligations acknowledged by the debtor before any of the Judges in or out of term, and in any part of England, or before the Lord Chancellor, or any other person for such purpose appointed by the king; or, by the custom of London, before the Lord Mayor and an Alderman, or Lord Mayor singly, and perfected by enrolment in some court of record, and on which execution may be sued out, in like manner as on a judgment. If execution be not sued out within a year and a day after the day assigned in the recognizance, a writ of *scire facias* must be issued to revive the judgment. Bac. Abr. 687. These recognizances must be enrolled within six months after acknowledgment. 2 Saund. 8. And they bind lands in the hands of a purchaser from the time of enrolment. Bac. Abr. Execution, 693. The writ of execution on a statute or recognizance, is a writ of *extent* or *extendi facias* against the body, lands, and goods of the debtor, (2 Tidd's Prac. 1031, 6th edit.) under which the sheriff must impanel a jury to extend the lands, as upon an *elegit*. 19 Vin. Abr. 557.

Nature and extent of estate acquired by these securities.

These securities possess one advantage over judgments. A judgment creditor, having a single judgment, cannot take more than a moiety of the lands of his debtor in execution, while a creditor under a statute-merchant, statute-staple, or recognizance, may take the *entirety* of the lands in execution. After extent by execution, and a writ of *liberati* sued and returned, a creditor by either of these latter securities will have an estate of a chattel interest, entitling him to hold the lands until he be satisfied his debt. 3 Pres. Abst. 340. The lands taken under a statute or recognizance, will, as in the case of an *elegit*, descend on the personal representatives of the conuzee as chattel interests; 1 Inst. 42. a. 250, b. 2 Inst. 396. 2 Vent. 327; and they are to be holden until the conuzee has received not

only his debt, but also his costs of suit and reasonable expences, which the Chancellor is to assess, and, therefore, although the time of the statute is expired, the consor will be put to his *scire facias* before he can regain possession of his lands. 4 Co. 67. 2 Roll. Ab. 479. If the debt be 100*l.*, and the extended value 5*l. per annum*, the estate will continue to the end of twenty years, but the estate may determine at an earlier period by casual profits, and the account may be taken at law on the writ *venire facias ad computandum*. At law, the extended value only is regarded, and this value is generally far below the actual value, so as to make an allowance for the loss of interest, &c. But in equity the estate is considered merely as a security for the debt—the interest of the tenant being redeemable, like a mortgage, on payment of principal, interest, and costs; and the account will be taken according to the actual, not the extended, value. *Marsh v. Lee*, 2 Vent. 338. Whether any specific period is fixed, after which a court of equity will not administer this relief, is a point on which no decision occurs. 2 Pres. Abs. 24. These interests being of a chattel quality, may be assigned as other chattel interests, without livery of seisin, or may be bequeathed by will as personal estate; and, on the death of the tenant, they will devolve to his executors, or personal representatives, or pass to a legatee by bequest and assent to that bequest, *ib.* The estate may be in reversion, or in possession, and one estate of this description may, it should seem, merge in another estate of the like description. *Dighton v. Greenville*, 2 Vent. 231, *Collis's Parl. Ca.* 64, and 3 Pres. Con. 177. 195. Lands purchased subsequently to the acknowledgment of the statute or recognizance will, as in the case of a judgment, be bound by the lien; *Bac. Abr. Exec.* 698, and as the statute was created for the benefit of merchandize, an alien merchant may extend the lands under a statute, and hold them against the king. *Bac. Abr. Aliens*, 138. After the debt and costs are satisfied, the proper discharge is the entry of satisfaction on the record; though, according to *Shep. Tou.* 358, the estate will not determine, except there be a judgment on the writ *venire facias ad computandum*, ascertaining that the debt is satisfied. For more on the subject of these securities the reader is referred to 2 *Cra. Dig.* 50. 2d. edit. *Shep. Tou. c.* 20. *Tidd's Prac.* 1110, et seq. 7th edit. and 2 *Wms. Saund.* 69 c.

SECTION IX.

CROWN DEBTS.

CROWN debts are either of record or not of record. The former bind the lands of the king's debtor from the time of his becoming such; and into whosoever hands the lands come the lien will attach. 2 *Rolls. Abr.* 156, (b), pl. 1. The crown, by its prerogative, has preference in all cases in which its debt is prior on record to the judgment, statute, or recognizance of the subject even if the lands have been actually delivered to the subject under *elegit* or extent. *Bac. Abr. Exc.* 735. 2 *Saund.* 70 c. *Gilb. Exch.* 88. If the judgment, statute, or recognizance of the subject be prior in date to the king's debt of record, the lands must be actually delivered to the subject in satisfaction of his debt, to entitle him to priority; for if the king's writ comes into the sheriff's hands, whilst the lands are in possession of the law on the *elegit* or extent, and not actually delivered to the creditor, the alteration of property will not be complete, and so the king's debt not postponed. *Gilb. Exch.* 91.

By the 13 *Eliz. cap.* 4. it is enacted, that all the lands, tenements, and hereditaments, which any accountant of the queen, her heirs and successors, hath, while he remains accountable, shall, for the payment of the debts of the queen, her heirs and successors, be liable and put in execution in like manner as if such accountant had stood bound by writing obligatory [having the effect of the statute-staple] to her majesty, her heirs and successors, for payment of the same. sec. 1. If the sum be not paid within six months after the account passed, the queen may sell so much of the debtor's estate as will answer the debt, the overplus of the sale to be returned to

Crown debts of record.

Lien on lands of accountants and their sureties.

the accountant or his heirs, by the officer that receives the purchase money without further warrant. ss. 2 and 3. If such accountant or debtor purchase lands in others names, in trust for his own use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such manner as before is expressed. s. 5. This act not to extend to charge any accountant, whose yearly receipts do not exceed 300*l.*, otherwise than as he was lawfully chargeable before. s. 10. The queen, &c. being satisfied by sale of lands, the sureties are to be discharged for so much; but if any yet remains unpaid, the sureties are to pay the residue rateably according to their abilities. s. 15.—On this statute, it has been held, that the lands of an accountant to the crown become bound from the time he enters into office, and not merely from the time he becomes indebted, so that sales by such receivers, before they become indebted, may be defeated by debts subsequently contracted. *Chan. of Oxford's Ca.* 10 Co. 55, 56. *Bp. of Bristol v. Coxhead*, Mos. 257. *Nichols v. How*, 2 Vern. 389; et vide Manning's Exch. 536, 537.

Crown debts not of record, entitled to priority over subject's execution, if property in goods not changed by sale and delivery.

Crown debts not of record, are those by simple contract, bond, or other speciality, which acquire no preference till found by inquisition, when they become debts of record. By the 50th and 53d sections of the Act 33 Hen. 8. c. 39, the king is enabled to proceed to execution on a bond executed to him without a previous inquisition; and by the 74th sec. of the same statute, it is enacted, that if any suit shall be commenced or taken, or any process be awarded for the king, for the recovery of any of his debts, then the same suit or process shall be preferred before the suit of any person or persons; and that the king, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons, so always that the king's suit be taken and commenced or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons. The words "and that the king shall have first execution," have been held to refer not to a preference as between two executions, the one sued out by the crown, and the other by the subject, but to a prerogative whereby the crown is to be first satisfied before the subject can take out any execution at all. Therefore, in *The King v. Allnut*, the court of Exchequer decided that goods seized under a *fi. fa.* at the suit of a subject were, before sale, liable to be taken by virtue of the king's extent, *tested* after the delivery of the *fi. fa.* to the sheriff, 16 East, 278. S. C. 7 T. R. 174. And this case has been confirmed by the subsequent one of *The King v. Soper*, 6 Pri. 114, where it was held, that the crown's right on an immediate extent, in preference to the execution of a subject, can only be defeated by the property being altered by a sale and delivery of the goods seized under the latter. At all events, whatever doubt may be entertained of the authority of *The King v. Allnut*, the court of Exchequer would not, so long as it remained uncontradicted by any later case, impeach it on a mere interlocutory motion. 6 Pri. 114. There is no distinction between an extent in chief, and an extent in aid in this particular, *ib.* Where in an action against the sheriff, it appeared that the *fi. fa.* had been in part executed by sale of some of the goods taken under it on Saturday, and the residue were sold on the Monday, after which, but before the payment over of the proceeds, the crown process was delivered to him; it was held, that by the sale the execution was complete, and the property thereby changed, and the party entitled to recover against the sheriff for money had and received. *Swada v. Morland*, 1 Brod. & Bing. 370. In 1 Gow. Rep. 39, it is made a question whether, if the king's extent be delivered to the sheriff on the very day on which goods taken under an execution at the suit of a subject are sold and delivered to purchasers, but after such actual sale and delivery—whether such extent will be entitled to priority? A verdict was found for the plaintiff (subject to a special case) that it would be so entitled to preference. In this case it was considered clear, on the authority of *The King v. Allnut*, *supra*, that delivery of the extent after entry and seizure, under an execution at the suit of a subject, but before sale and delivery, will give it priority. See also *Pugh v. Robinson*, 1 T. R. 116. *Thurston v. Mills*, 16 East, 254, and *Dale v. Birch*, 3 Camp. 347.

Goods bound from teste.

As the crown is not bound by the statute of frauds, which directs that chattels shall be bound from the delivery of the writ of execution into the hands of the sheriff, the property of the king's debtor is bound from the day of the teste, although the writ be not delivered to the sheriff, or even sued out till long afterwards. *Man. Exch.* 544.

Extents in aid, are now very properly confined to the amount of debt actually due to the crown, and not allowed, as formerly, to cover debts due to the king's debtors of larger amount than the debts due by them to the crown. 57 Geo. 3. c. 117.

Extent in aid.

If an estate, subject to a mortgage, be sold absolutely under an extent, and the purchase money paid into court, the crown will not be allowed, on motion, to satisfy the mortgagee, but the court will order a reference to the Deputy Remembrancer, to ascertain what is due on the mortgage. *King v. Combes*, 1 Pri. 207. Notice of motion for an order of sale of a crown debtor's mortgaged lands under an extent, should be given to the mortgagee before the motion can be made, ib.

Extent on estate subject to mortgage.

SECTION X.

IRISH LEASE AND LOAN.

THE mode in Ireland of granting a lease at a reduced rent, in consideration of the money borrowed, or of granting a lease, which is in fact, accompanied with a contract for borrowing and lending, has been before noticed, see *antea*, 374, of this edition, n. (E). In *Brown v. O'Dea*, 1 Sch. & Lef. 115, a beneficial lease granted at the same time as a loan of money by the lessee to the lessor was held fraudulent and void, since it afforded to the lender a profit on the money advanced beyond legal interest. It was attempted to distinguish these transactions, but Lord Redesdale said, that as nothing appeared in the case to separate them, they must be taken to be one and the same contract. He added, that it would perhaps have been a good rule to have held, that a lease of this nature should, in every case, be inoperative, for that it was to be presumed that whatever advantage the tenant obtained by the lease, was the inducement to him to lend the money, and that was obtaining a profit for the loan of money beyond what the law allowed; 1 Sch. & Lef. 119. In *Hunt v. Potter*, 1 Sch. & Lef. 119, n. (a), the evidence as to the lease and loan being one transaction, was contradictory. An issue was therefore directed to try "whether the plaintiff, at any time, and when, previous to the day on which the lease was executed, contracted, and agreed with the defendant to grant the said defendant the lease in question, or whether such lease was wholly independent of and unconnected with the loan or treaty, or communication for a loan of money." So in *Drew v. Power*, ib. 182, the Lord Chancellor was about to direct an issue to the same effect but afterwards found the evidence before him sufficient to decide the case, and he declared that the lease having been obtained under the influence of a loan of money, expected to be obtained by the lessor from the lessee, the case was void. On this occasion Lord Redesdale further observed, that when the loan of money is an inducement to granting a lease, it vitiates the whole transaction; for the policy of the law would be completely defeated, if courts were not to watch such contracts with severity, and be sure that they did not permit persons, under cover of ordinary dealings between man and man, to obtain an advantage beyond the legal interest. If every man could obtain for the loan of his money as high a rate of interest, without hazard, as they who employed it in trade and manufactures, no man would employ his money in hazardous undertakings, the most industrious of the people would be ground down by usurers, who would get the profits of trade, and the enterprising and industrious trader would be ruined; 1 Sch. & Lef. 195. On these principles, a lease granted at the same time with the loan of money, by the lessee to the lessor, was in another case set aside, although the proposal for connecting the loan with the lease moved from the lessor; but a *bond fide* under-lease from the lender was permitted to stand. Where A. who was seised of the reversion in fee of premises which were let to E. for a term of years at 15*l.* 8*s.* yearly rent; agreed to sell to B. the rent reserved by that lease for the residue of the term for a certain sum, the principal and interest of which was to be reimbursed to B. before the

Cases where lease connected with loan of money, held inoperative.

expiration of the term, by the perception of the rent, supposing it punctually paid; and, at the same time, A. being induced by the accommodation offered him by B., in purchasing the rent, made a lease for lives renewable for ever to B. of the same premises, and at the same rent which he paid, but the lease was not to commence nor the rent be payable until the expiration of E.'s lease; at which time the premises would be worth from 20 to 22l. *per annum*; it was held, that this was not impeachable as a lease coupled with a loan, the first transaction being a fair purchase of the rent, and the second, though induced by the first, was not distinguishable from a lease made upon payment of a fine. *Lewkey v. O'Donnell*, 2 Sch. & Lef. 466, and this decree was affirmed on appeal by Lord Chancellor Ponsonby, 2 Sch. & Lef. 742.

Cases where
lease remotely
connected with
loan, held
good.

We now turn to *Webb v. Rorke*, 2 Sch. & Lef. 661, which Lord Manners declared he was not prepared to follow, see *antea*, p. 374, n. (E). In *Wilton v. Brown*, 1 Ball. & Bea. 125, a lease had been made at a stipulated rent, and the landlord at the same time obtained from the tenant a sum of money (two years rent) in which the tenant was secured by another lease of the same date for two years, at a nominal rent, the interest to be retained out of the first sale payable under the other lease. Lord Manners decided, that this was not a lease in consideration of a loan, as the relation of debtor and creditor did not exist; and that the tenant by action could not recover the money; it was but an advance of rent, by way of fine or foregift. His Lordship also held, that after great length of time the question of undervalue could not be entertained, 1 Ball. & Bea. 130. So a lease, which contained a clause, empowering the tenant to retain the rents till a sum of money advanced to the landlord at the time of granting the lease was repaid, but for which no separate security was given, was held by the same noble Lord not impeachable on the grounds of being a lease connected with a loan. *Prior v. Dumphy*, 1 Ball. & Bea. 27. And where there was a lease at a fair rent, the lessee paying two years rent in advance, the regular payment of which rent was secured by the lessor's bond and insurance on his life, Lord Manners held, that the lease was not impeachable, either as fraudulent on a power to lease without fine, or as being accompanied with a loan of money. His Lordship, on the latter point, observed, that in cases of forfeiture particularly, the court will always look into the real transaction between the parties; and he was satisfied, that in the case before him, the advance was never intended to be either a loan of money or a fine, but was a mere anticipation of rent, and such being the intention of the parties, if it did not operate to reduce the rent, he would not strain a point in order to work a forfeiture. And Lord Manners thought it not to be the duty of the court to extend the doctrine of lease and loan further than it had been already carried; for, it had too often been made the instrument of fraud and dishonesty by those who came, upon that ground, to be relieved against their own acts deliberately and fairly entered into; nevertheless, whenever the case of lease and loan was clearly established, the court would certainly grant relief. *O'Brien v. Grierson*, 2 Ball. & Bea. 332.

Latest general
rule.

Usury as con-
nected with
lease and loan.

In *The King v. Drury*, 2 Lev. 7, the defendant was indicted for usury in taking more than legal interest by obtaining a beneficial lease. Hale, C. J. before whom he was tried, said, that if any other security for payment of the money had been given, or that by any collateral agreement it was to be repaid, and all this a contrivance to avoid the statute, it would be usury. But a covenant to grant a new lease for a further term, at the same rent, and in consideration of a loan of money, was held by Sir Joseph Jekyll, M. R. to be such a lien as bound the right in whose hands soever it came. *Steed v. Cragh*, 9 Mod. 43. S. C. *antea*, 717, of this edition, text.

Remainder-
man cannot set
aside lease by
tenant for life
on ground of
loan.

On this subject it may be finally remarked, that a bill will not lie at the suit of a remainder-man to set aside a lease granted by a tenant for life, on the ground of its being accompanied with a loan of money; there being no privity between them, and the remedy being at law. *Corbet v. Segrave*, 2 Ball. & Bea. 98..

SECTION XI.

CASES ON BANKRUPTCY.

IF the mortgagor become bankrupt, the mortgagee cannot prove under the commission, and then resort to his security for the residue. Lord Hardwicke has said, that "every creditor is to swear whether he has a security or not; if he has a security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large, be they mortgages or pledges." *Grove, Ex parte*, 1 Atk. 104. *Twogood, Ex parte*, 19 Ves. 231. The usual course in this case is, for the mortgagee to pray a sale of the estate under the general order in bankruptcy, (8th March, 1794,) and if the money produced thereby be insufficient to pay the expences of the sale, and his principal, interest, and costs, then to come in as a creditor under the commission. This order (which was made by Lord Loughborough, C.) directs, that upon application to the major part of the commissioners named in any commission of bankruptcy, by any person claiming to be a mortgagee of any part of the bankrupt's estate or effects, the said commissioners shall proceed to enquire, whether such person is such a mortgagee and for what consideration, and under what circumstances; and if the commissioners find such person to be a mortgagee, and no sufficient objection shall appear to his title, or to the sum claimed by him, then that the commissioners do proceed to take an account of the principal, interest, and costs due upon such mortgage, and of the rents and profits of the mortgaged premises received by such mortgagee, or by any other person or persons, for his use; and that the commissioners do then cause due notice to be given in the *London Gazette*, and in such other of the public papers as they shall think fit, when and where the said mortgaged premises are to be sold before them, or by public auction at any other place or places, if they shall so think fit; that such sale be made accordingly; that all proper parties do join in the conveyance to the purchaser, as the said commissioners shall direct; that the monies to arise from such sale be applied, in the first place, in payment of the expences attending the same, and then in payment of what shall be found due to such mortgagee, for principal, interest, and costs; and that the surplus of the said monies (if any) be paid to the assignees of the said bankrupt: but in case the monies to arise from such sale be insufficient to pay what shall be found due to such mortgagee, then that such mortgagee be admitted a creditor under the said commission for such deficiency, but so as not to disturb any dividend then already made; and for the better making such inquiry, and taking such account as aforesaid, and making a title to such purchaser, it is lastly ordered, that all parties be examined by the said commissioners, upon interrogatories or otherwise, as the commissioners shall think fit, and do produce before the said commissioners, upon oath, all deeds, papers, and writings in their respective custody or power, relating to the estate or effects of the said bankrupt, as the commissioners shall direct. 4 Bro. C. C. 550. 2 Cooke, B. L. 284. Whitmarsh, B. L. 478.

Mortgagee may pray sale under general order in bankruptcy.

If the equity of redemption be not in the bankrupt the commissioners cannot, under this general order, direct a sale; *Topham, Ex parte*, 1 Mad. Rep. 38, nor can they compel a second mortgagee, not claiming under the commission but relying on his security, to join in a sale obtained by a first mortgagee. *Jackson, Ex parte*, 5 Ves. 357. 1 Mad. 38, n. The only way, therefore, to make a title in this case, is for the creditors to redeem both mortgages. 2 Chris. B. L. 110. But if the second mortgagee be present at the time the order for sale is made, and suffers the sale to go on, he cannot afterwards object to joining; per Lord Loughborough, in *Jackson, Ex parte*, supra. In *Wiseman v. Carboneil*, 1 Eq. Ca. Abr. 312, pl. 9, the plaintiff had a mortgage and bond for the money lent, the equity of redemption was mortgaged again, and the second mortgagee had also a bond; the mortgagor became bankrupt, and the first mortgagee brought a bill to have the premises sold, and if they fell short (as they did) to come in as a creditor for the deficiency: it was so decreed, and the second mortgagee was directed to stand on his bond. This case, says Mr. Christian, has introduced the practice of allowing the mortgagee to prove for the deficiency upon a sale of the mortgaged premises, pledge, or lien, though there be no

Cases on general order.

When requisite to apply to court to bid at sale.

Auction duty.

Mortgagee cannot retract election to prove.

bond, note, or other security. 2 Christ. B. L. 108, 2d edit. If there be a first and second mortgage, the second mortgagee may petition the Chancellor that the premises may be sold; *Howell, Ex parte*, 7 Vin. Abr. 103; or he may apply to the commissioners for a sale under the general order, (2 Christ. B. L. 108,) and it may be questioned whether the latter is not now the only, as it certainly is the preferable, remedy open to him, besides a foreclosure. If the produce of the estate be insufficient to discharge the debt and costs, the mortgagee, proving for the remainder under the commission, cannot charge interest beyond the date of the commission. *Badger, Ex parte*, 4 Ves. 165. Upon an application to the Chancellor that the sale of the premises might be in the country, Lord Thurlow would give no directions therein, but left it to the commissioners to sell in the manner they thought most advantageous, *Comings, Ex parte*, 1 Ves. jun. 112. In cases where it is necessary for the mortgagee to apply to the court for leave to bid at a sale, or to become a purchaser, there must be the possibility of some conflicting interest, otherwise the application will be unnecessary. *Ducane, Ex parte*, 1 Buck. B. C. 18. But in a subsequent case Mr. Preston, *as amicus curiæ*, stated the general understanding of the profession to be, that it was necessary in every instance for the mortgagee to apply to the court for liberty to bid at the sale. And the court seems to have acquiesced in that suggestion. *Hammond, Ex parte*, ib. 464. It is difficult however, to draw such a general rule from the decided cases; (see them collected, *antea*, 124, of this edition, *in notis*;) nevertheless it would now be imprudent to neglect obtaining an order for such purpose.

By the statute 43 Geo. 3. c. 69, schedule A. (Excise consolidation act,) a duty of sixpence in the pound is imposed on sales by auction. But the 15th section (19 Geo. 3. c. 56,) provides, that nothing in this or the rectified act shall extend to charge with the said duty, any estate or effects of bankrupts sold by order of the assignee or assignees under any commission of bankruptcy. Lord Kenyon has held *ad nisi prius*, that sales under the above general order, are subject to the auction duty, notwithstanding the exceptions in this statute, because the property sold is in fact the property of the mortgagee, and not of the bankrupt. *Coare v. Creed*, 1 Esp. 695. Mr. Christian adds, "I should scarce think this opinion would be adopted by other judges; for the mortgagee is to receive his debt free from all costs." 2 Christ. B. L. 111. It has however been followed in *King v. Abbott*, 3 Pri. 178, with this distinction, that if the assignees take upon themselves to sell, not merely the equity of redemption to which only they are entitled, but the whole property absolutely, they will be liable for the duty, because they cannot state in their certificate that *all* and every the estates, goods, &c. specified in the catalogue, were really and truly the property of the bankrupt at the time of suing forth the commission. Baron Graham said, that it was a frequent practice to direct a sale of an equity of redemption alone, and that was what the assignees should have done. It was not important whether the mortgagee's assent were expressed or implied. The assignees chose to sell the whole, and might have pledged themselves to make a title to the purchaser; and if, in doing so, they took upon themselves to sell the property unincumbered, for their greater advantage, they must do it with all its consequences. In the case of pledges of personal goods, the property was substantially in those who had the rightful possession. In this instance the learned Baron was clearly of opinion that the assignees had made themselves liable to pay the duty. And per Richards, Baron, if the mortgagee had sold his mortgage by auction, he would have become liable to pay the duty, *although the sale had not proved sufficiently productive to satisfy his debt*. 3 Pri. 197. After a review of this case Mr. Christian is still obliged to think, that the composers and enactors of the statute 19 Geo. 3, meant to include by the general words "estate, effects, goods, chattels, and property of the bankrupt," all that interest in the bankrupt which must be sold by order of the Chancellor, or the commissioners, for the benefit of the creditors, and the learned professor suggests, that if the legislature, in this instance, have not expressed themselves with sufficient clearness, the omission ought to be supplied by the first statute passed upon the bankrupt law. 2 Christ. B. L. 587, 588.

A mortgagee having once elected to prove, under the commission, as a creditor, cannot afterwards retract, and betake himself to his security. *Downes, Ex parte*, 18 Ves. 290. On this principle it should seem to follow, that a mortgagee coming in under a composition deed, would not be allowed to retract the election he has made, but as the intention of these deeds is to

prevent the suing out a commission of bankrupt, (in order to effectuate which, it is necessary that all the creditors should join; *Bamford v. Baron*, 2 T. R. 594, n.) it has become usual to insert in all deeds making provision for debts, an express declaration that creditors holding a special security shall not be prejudiced by concurring in the general arrangement.

A mortgagee who takes a security from two persons, one as principal, and the other as surety, need not give up his joint security upon the bankruptcy of the principal, for he may come in as a general creditor; and if that is insufficient to pay him his whole debt, he may afterwards resort to the surety under his joint security. 2 Atk. 527. *Wildman, Ex parte*, 1 Atk. 109. *Parr, Ex parte*, 1 Rose, 76. So where a bankrupt, previous to the commission against him, procured persons to assign an interest in copyhold premises as a security to a creditor of his; it was held, that the creditor might prove under the commission, without delivering up such security. *Goodman, Ex parte*, 3 Mad. 373. But the court would not order a sale of premises for more than the mortgage debt, or pay a debt due on the bankrupt's recognizance, in aid of his sureties, where the recognizance was of a private nature. *Usher, Ex parte*, 1 Ball & Bea. 197.

Not bound to give up joint security.

If a mortgagee becomes bankrupt before the time appointed for repayment of the principal money, yet if the mortgagee has a bond for the same debt, and default has been made in one payment of the interest contrary to the express terms of the condition, the mortgagee may prove for the principal sum and the interest then due as a present debt; for one default makes him a legal creditor for the whole penalty. *Fisher, Ex parte*, 3 Mad. 159. S. C. 1 Buck. 188. In *Numm, Ex parte*, 1 Rose, 323, it was held, that where a creditor has a mortgage, which is sure to be deficient, he may fix a limit, and prove the remainder, in order to vote in the choice of assignees. Et vide S. L. *De Tasset, Ex parte*, ib. 324. But in a subsequent case, Lord Eldon said, the great seal would very cautiously relax the practice which required a security to be sold before a proof could be admitted, by ordering it to be taken at a valuation; and held, that an application for that purpose must depend upon its special circumstances, of which the general benefit of the creditors, and the amount of the applicant's debt, were very material; and in the case before him, which was the case of a pledge and deposit, he saw nothing to exempt it from the general practice. *Smith, Ex parte*, 2 Rose, 63. This decision seems founded on a reasonable ground; for how can the creditor, on proof of his debt, swear that he has no security for the same. In a case where the acceptors of a bill became bankrupts, and the holders took a mortgage from the drawers, Lord Eldon determined, that they might prove against the acceptors without deducting their security; for that the deduction of a security was never to be made but when it was the property of the bankrupt. *Parr, Ex parte*, 1 Rose, 76.

Having bond may prove, and fix deficiency, to vote for assignees. Sed quæ.

If a mortgagee gives notice to the tenant in possession to pay the rent to him, and he pays it to the assignees of the mortgagor, the Chancellor will not order them to refund the rent to the mortgagee; for if the mortgagor receives the rents, no court will compel him to pay them over to the mortgagee. *Wilson, Ex parte*, 1 Rose, 444. S. C. 2 Ves. & Bea. 252. A mortgagee of a bankrupt's estate, though he pays the arrears of rent that are due to the bankrupt's landlord, unless he applies to the court for an order that he may stand in the place of the landlord in consideration of his paying the arrears of rent, shall not be preferred to the creditors under the commission. *Anon.* 1 Atk. 103. But Mr. Cooke observes, that it rather seems no such order could be obtained, because unless the landlord actually distrains, he has himself no lien on the goods. *Cooke. B. L.* 185.

Of rent.

A conveyance by a trader of all his estate and effects, by way of mortgage, though for securing a sum of money not one-sixth of the value of the property, is an act of bankruptcy, and will make the mortgage void. *Hassel v. Simpson*, 1 Bro. C. C. 99. *Devon v. Watts*, 1 Dougl. 87. 89. *Cooke. B. L.* 99, 7th edit. So a security given by a debtor, who is a trader within the bankrupt laws, in order to give a particular creditor an undue preference in the payment of his debt, and in contemplation of an act of bankruptcy, is fraudulent as against the general creditors, and therefore void. *Linton v. Bartlett*, 3 Serjt. Wils. 47. But where a trader by settlement on his marriage, in consideration of 1000*l.* (his wife's fortune) conveyed a particular house, held for a term of years to trustees, upon trust, to permit him (the trader) to receive the rents and profits until his death, or until he should happen to fail in his credit or circumstances, or become a bankrupt, whichever should first happen; and in case any of the above events

Mortgage of all trader's effects, act of bankruptcy, and voidable. Contra of settlement, which secures to wife her fortune on death or bankruptcy of her husband.

should take place during the life of his intended wife, that the trustee should, immediately after, raise by sale or mortgage 1000*l.* and should pay it to the intended wife, the same not to be liable to his debts and engagements; and afterwards the settlor became bankrupt, this was held to be a fair and valid settlement in nature of a mortgage to secure the wife's fortune, and an injunction to restrain the trustees from recovering the house at law, was refused. Lord Eldon, however, observed, that a trader could not, on his marriage, settle his property in such a manner that in the event of his bankruptcy his wife should be entitled to a provision out of it in prejudice to his creditors; and if such were the case before the court, his Lordship would have had no hesitation in granting the injunction. But though the property in the case before him, strictly speaking, was the husband's, yet in reality it was the fortune of the wife, intended as a provision for her and her children in case of the bankruptcy of her husband, and advanced to him on condition that the wife should have it again on that particular event, he giving a security for it on his own property, in nature of a mortgage. That event having happened, the wife became a creditor on this particular fund, and was entitled to have the benefit of her special lien on this property. *Higginson v. Kelly*, 1 Rose, 368, et vide *Meagham, Ex parte*, 1 Sch. & Lef. 179. *Hinton, Ex parte*, 14 Ves. 598, and *Lockyer v. Savage*, 2 Str. 947.

Mortgagee may petition to stay certificate.

A mortgagee may petition to stay the bankrupt's certificate. In the case supporting this position, the mortgagee made no application to the commissioners until the third meeting, which induced the Vice-Chancellor to dismiss his petition. The mortgagee appealed, and the Lord Chancellor directed that search should be made at the bankrupt office for precedents; which was accordingly done, and the following precedents produced confirmatory of the doctrine above stated: *Rigge, Ex parte*, in *re Perry*, 20th March, 1780. *Horn, Ex parte*, in *re Sidebottom*, 20th July, 1782. *Hurford, Ex parte*, in *re Kekwick*, 10th April, 1784. But as the probable amount of the mortgagee's debt was disputed, the Lord Chancellor would not make the order for staying the certificate, but directed it to be deposited in the bankrupt office, subject to his further order thereon. *Whitechurch, Ex parte*, 1 Glyn. & Jam. Rep. 73, et vide *Ramsbottom, Ex parte*, 2 Christ. B. L. 709. Where a bankrupt, who had obtained his certificate, being possessed of leasehold premises as executor and residuary legatee, mortgaged them to secure a debt of his own, and afterwards assigned the equity of redemption for valuable consideration, the deed reciting that the assignment was made for the purpose of paying the debts of the testatrix, and the assignee procured an assignment of the mortgage, it determined that the assignees under the bankruptcy, had no right against the assignee for valuable consideration, though they proved in an action that the bankrupt's certificate was fraudulently obtained. *Bedford v. Woodham*, 4 Ves. 40, n.

Reputed ownership. Stat. of Jac.

A few cases on the statute 21 Jac. 1. c. 19. ss. 10 & 11, (which have been previously treated of, ante, p. 40, of this edition, et seq. and 43, ib. n. (H.)) remain to be noticed. Where stock standing in the Accountant-General's name was mortgaged to secure a debt, and the Accountant-General transferred it to the mortgagor without the privity of the mortgagee, and the mortgagor afterwards became bankrupt, it was held, that the stock did not belong to the assignees; for that when the mortgage was made, the stock was not in the possession, order, and disposition of the bankrupt, and though it was so after the time of the bankruptcy, yet it did not appear that it was with the consent and permission of the true owner, and the mortgagee was the true owner, the sum lent being more than the value of the stock. *Richardson, Ex parte*, 1 Buck. 480. Where there was a mortgage of a ship in the port of Dublin, and a delivery of the muniments, and the mortgagee insured her there, and made a second mortgage: and the second mortgagee took possession as soon as he was informed she was in an English port. This was held a sufficient possession to take the case out of the statute. *Batson, Ex parte*, 3 Bro. C. C. 362. But where a merchant pledged for value the bills of lading of an expected cargo; and his agents, who were part owners, without the knowledge of the owner or the pawnee, disposed of part of the cargo abroad; after which the owner became bankrupt, and he induced the agents to replace the goods disposed of, by others, of which the agents gave him bills of lading, and he sent them to the pawnees to make good their securities, it was held, that the assignees of the bankrupt might recover the substituted goods against the pawnees. *Meyer v. Sharpe*, 5 Taunt. 74. So goods in a bonded warehouse after sale, though

marked with the initials of the vendee, have been held to remain in the power, order, and disposition of the vendor, and to pass to his assignees in bankruptcy. *Knowles v. Horsfall*, 5 Barn. & Ald. 134. And it has very recently been decided that under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, form part of the joint estate. *Burn, Ex parte*, 1 Jac. & Walk. 378.

Generally speaking, the enrolment of a bargain and sale under the 27 Hen. 8. c. 16, relates to the time of its execution, so as to avoid all mesne acts of the bargainor; yet such relation does not take place on the bargain and sale by commissioners of bankruptcy of the debtor's real estate, and therefore the execution of the crown, if tested before the enrolment, will find the property still vested in the bankrupt, and consequently liable to the extent. *Perry v. Bowers*, Sir Tho. Jones, 196. S. C. 1 Vent. 360. 2 Show. 156. *Elliott v. Danby*, 12 Mod. 3. *Doe v. Mitchell*, 2 Maul. & S. 446. Man. Exch. 540. And it is observable that the assignment of the commissioners of bankrupt, as against the king, will not relate to the time of the bankruptcy, as it will between subject and subject. *Queen v. Arnold*, 7 Vin. Abr. 104. *Attorney-General v. Handbury*, 2 Show. 481, cited *Attorney-General v. Capell*, ib. 480. *Brassey v. Dawson*, 2 Stra. 978. Man. Exch. 440. But if the extent be tested on a day subsequently to the assignment, even to a provisional assignee, it will come too late; (*Drury v. Mann*, 1 Atk. 95, et vide 14 Ves. 87), and it is said the crown cannot prove its debt under the commission. 2 Str. 752. Man. Exch. 545.

Extent.
Preference.
Relation.

SECTION XII.

EJECTMENT.

IN reference to the action of ejectment, it is observable, that if the defendant prove a title out of the lessor, it will be sufficient, though he have no title in himself; but he ought to prove a subsisting title out of the lessor. Thus if he produce an ancient lease for 1000 years, it will not be sufficient, unless he likewise prove possession under such lease within twenty years. Bul. N. P. 110. But in an ejectment brought by a second mortgagee against the mortgagor, the latter was not allowed to give in evidence the title of the first mortgagee in bar of the second, he being estopped from averring (contrary to his own act) that he had nothing in the land when he took upon himself to convey by the second mortgage. *Lindsey v. Lindsey*, Bull. N. P. 110 a. So a person accepting a mortgage will be prevented from questioning the title of the mortgagor. Therefore in ejectment, where the defence set up was, that the mortgagor claimed under a lease from the crown for a term which, by the 1 Ann. st. 2. c. 7, was void, it was not allowed. *Doe v. Abrahams*, 1 Stark. 305; and see *Blake v. Foster*, 8 T. R. 487. *Wood v. Day*, 1 J. B. Moore, 389. And the same principle, it seems, will extend to the assignee of a mortgagee; *Barwick v. Thompson*, 7 T. R. 488, where it was expressly held, that if B. claiming under A. let lands for a year to C. and die, and A. afterwards brings an ejectment against C., C. cannot dispute the title of A. In *Cordingley v. England*, 3 Keb. 712, antea, 112, of this edition, it was held, with an adjournment, that a mortgagee is not estopped from averring that the mortgagor had no estate in the land; sed vide the note (Q) there, and *Parker v. Manning*, 2 T. R. 537.

If the defendant in ejectment produce a mortgage deed, where the interest has not been paid, and the mortgagee has not entered, it will not be sufficient to defeat the lessor who claims under the mortgagor, because it will be presumed, that the money was paid at the day, and consequently that it is no subsisting title; but if the defendant prove interest to have been paid upon such mortgage after the time of redemption, and within twenty years, it will nonsuit the plaintiff, per Holt, C. J. in *Wilson*

Ejectment.

Dry mortgage
no bar to eject-
ment, when.

v. *Wetherby*, Bull. N. P. 110 a. Where there is a mortgage term outstanding, it will be a bar to a recovery in ejectment at law, even between heir and devisee claiming subject to the charge. The only remedy therefore in such a case is in a court of equity. *Barnes v. Crow*, 4 Bro C. C. 2. 8. C. 1 Ves. jun. 486. In *Farmer v. Rogers*, 2 Serjt. Wils. 26, the defendant produced a mortgage for years by deed from the plaintiff's ancestor, upon which was an indorsement in *hac verba*, "Received of Mrs. M. O. 500l. on the within recited mortgage, and all interest due to this day; and I do hereby release to the said M. O. and discharge the mortgaged premises from the said term of 500 years." On a case reserved, the court held, 1st. That these words amounted to a surrender of the term. 2d. That such surrender might be by note in writing by the statute of frauds; and 3d. That a note in writing was not required to be stamped. But though a surrender or an assignment of a term may be made by note in writing without stamp, yet if it be made by deed under seal, it must be stamped; *Goodright v. Gregory*, Loft. 339. And by the present stamp act, a stamp is required in the former case.

Statute empowering landlords to enter without ejectment, saves interest of mortgagee of lease.

By the 4 Geo. 2. c. 28. s. 2, it is enacted, that every landlord who, by his lease, hath a right of re-entry, in case of non-payment of rent when half a year's rent is due, and no sufficient distress is to be had, may recover without any previous demand of rent; and a recovery so had shall be binding on all parties; but it is expressly provided, that the act shall not extend to bar the right of mortgagees of the lease who are not in possession, as such mortgagees do, within six calendar months after judgment had, and execution executed, pay all arrears of rent, and all costs sustained by the lessor, and perform all the covenants which are reserved to be performed on the part of the lessee. On this statute it has been held, that the mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. Where therefore the mortgagor distrained under this statute, and took possession, and afterwards re-demised for another term of fourteen years, and the second lessee entered and expended money in improvements, on an affidavit of C. (the mortgagee of the first lessee), that he knew nothing of the ejectment till after the writ of possession was executed, the court of Common Pleas made a rule nisi absolute, which on a former day it had granted, that upon payment by the mortgagee, to the lessor, of the rent in arrear, and costs of the ejectment and of the then application, the mortgagee should have the premises given up to him. *Doe, d. Whitfield v. Roe*, 3 Taunt. 402.

Same in Ireland.

By the 8 Geo. 1. c. 2. s. 4. (Irish stat.) it is enacted, that when any lease, for the avoiding of which an ejectment for non-payment of rent shall be brought, which lease, before the ejectment brought shall have been mortgaged, and the lessee and mortgagee, and their respective assignees, shall be duly served with a summons in the said ejectment, and a proper affidavit of the said summons shall be made and duly filed, and the plaintiff shall obtain judgment and execution in the said ejectment, then if the said mortgagee, or his assignee, shall not, within nine months after such execution executed, pay or tender unto the said landlord or lessor, the said rent in arrear, and costs, to be ascertained in the manner therein mentioned, such mortgagee, or his assignee, shall be barred of all relief and remedy in law or equity on account of the said mortgage. By the fifth section it is provided, that where the mortgagee, or his assignee, shall not have registered his mortgage within six calendar months after its perfection, the landlord may proceed in ejectment and obtain judgment and execution thereon, although such mortgagee, or his assignee, be not served with the above summons, in such manner as if the mortgagee or assignee had been duly served. But it has been held, that a mortgagee, or his assignee, will be entitled to a summons if notice of the mortgage or assignment can be proved on the lessor, although the mortgage assurance may not have been registered according to the act. *Biddulph v. St. John*, 2 Sch. & Lef. 532, et vide antea, 196, of this edition, *in notis*. It has also been held, on this statute, that though six months may have elapsed since the execution of an ejectment for non-payment of rent, a mortgagee of the tenant's interest, upon payment of the writ in arrear and costs to the landlord before the expiration of nine months after the execution, will be entitled to be put into possession. *Barnard v. Brownrigge*, 1 Vern. & Scriv. 258.

Where the proposed security is a lease which contains a condition that on non-payment of rent the lease shall cease and be void, as distinguished

Mortgagee of lease should enter.

from a lease which contains a proviso for re-entry in the like case, the mortgagee should take immediate possession, so as to be enabled, out of the profits, to pay the rent regularly, and retain the surplus for his interest, &c. A tenant to the mortgagor, who does not give him notice of an ejectment brought by the mortgagee, is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12. (i. e. three years improved rent for secreting ejectments), because, as was observed by the court, that the act extends only to cases where ejectments are brought which are inconsistent with the landlord's title. *Buckley v. Buckley*, 1 T. R. 647. Ejectment for toll-houses, &c. lies by the mortgagee of a proportion of the tolls mortgaged, for an advance thereon, though the act directs that the different mortgagees shall be creditors in equal degree. *Doe v. Booth*, 2 Bos. & P. 219. It is merely necessary to subjoin the following observations of Lord Erskine, in *Radcliffe v. Warrington*, 13 Ves. 334. "The case of a mortgage turns upon circumstances peculiar to it. The single object of the transaction in its original construction is to create a security for money. The court, by permitting redemption, does not dispense with any thing for which either party contracted, but gives effect to the original object of both. So, the covenant for payment of rent is inserted, in order to give security to a party demiseing his estate for a term. He brings an ejectment, which is used as a spur, and the true object of the contract is obtained, either under the statute 4 Geo. 2. c. 28; or, if the case is not within the statute, this court gives relief in cases that appear fit for it."

Tenant should give notice of claims.

Tolls.

Ejectment a spur.

SECTION XIII.

OF THE DOCTRINE OF ELECTION.

THE question of election cannot affect the mortgagee, for, as between him and the mortgagor, the very act of making the mortgage is an exertion of ownership which demonstrates the mortgagor's election to take the thing pledged, but it does not conclude him with reference to other persons. Where a party, bound to elect between two funds, having mortgaged one, elects to take the other, the former must be taken subject to the mortgage, but shall be reimbursed by the latter; as where an heir at law, who was bound to elect whether he would take a copyhold estate not surrendered to the use of the will, or an annuity bequeathed to him by the will, he having, under the supposition that he was entitled to both, procured himself to be admitted to the copyhold estate, and mortgaged the same for 700*l.*—in such case, where he elected to take the annuity in preference to the estate, it was held, that the devisee taking the estate, must take it subject to the mortgage, but that he was entitled to apply to the court for satisfaction out of the annuity to the extent of the mortgage. *Rumbold v. Rumbold*, 3 Ves. 65. So, where a testator having a debt secured on lands, gave the mortgage money to the mortgagor, and desired him to give a reversionary interest therein to a third person for life, and the mortgagor sold the estate, it was determined, that he should bring the mortgage money into court, for the use of the devisee, subject to the life estate. *Lewis v. King*, 3 Bro. C. C. 600. If a man has subjected his estate to special limitations or incumbrances, and by his will makes a new disposition of his property, discharged of the incumbrances, or under different limitations, if the incumbrancers derive other interests under the will, they must not disappoint it, but must permit the estate to go in the new channel, and as free from incumbrances as the testator intended. If therefore a mortgagor bequeaths to his mortgagee a legacy or any other benefit, and devises away the estate in mortgage, free from all incumbrances, in express words, or it can be collected by a fair interpretation, that the testator intended the

Statement of doctrine, as it applies to mortgages.

estate to go to the devisee discharged of the mortgage and free from incumbrances, the mortgagee, if he takes the legacy must release his incumbrance. *Blake v. Bunbury*, 1 Ves. jun. 523. But general words are not alone sufficient to pass an estate free from incumbrances. *Ib.* et vide further, *French v. Davis*, 2 Ves. jun. 581; and generally, 1 Swan. Rep. 381, *in nota*.

SECTION XIV.

OF THE MERGER OF CHARGES.

*General rules
as to merger
of charges.*

A PERSON, having a mortgage or equitable lien on an estate for the payment of a sum of money, and afterwards becoming entitled to the estate itself, either for life or in tail, is not, by the mere accession of the estate for life, or in tail, deprived of the benefit of his mortgage or lien; for he has a partial interest in the estate, and an absolute right to the money; and there is no ground in equity to exonerate the estate in favor of the persons in remainder, or of the issue in tail, to the prejudice of the personal representatives of the tenant for life, or in tail. *Duke of Chandos v. Talbot*, 2 P. Wms. 604. 15 Vin. Abr. 369, pl. 4. *Wyndham v. Egremont*, Amb. 753. But where a person is absolutely entitled to a sum of money charged on an estate, and afterwards becomes entitled to the fee-simple thereof, the court of Chancery, in most cases, consolidates the rights by extinguishing the mortgage or equitable lien. Thus, where A. devised certain premises (subject to a mortgage of 3,500*l.*) to his three daughters, to be divided equally; one died, and the mortgagee bequeathed to the two survivors all the money due on the mortgage and the interest, so that it did not altogether exceed 4000*l.*, and if it did not amount to 4000*l.*, then to be made up; and the other daughter died leaving all her real and personal estate to her surviving sister, it was decided that the charge merged in the inheritance. *Price v. Gibson*, 2 Eden, 115. This rule, however, has two exceptions; the first in favor of creditors, (*Norfolk v. Gifford*, 2 Vern. 208, *Compton v. Oxendon*, 2 Ves. jun. 261;) and the second in favor of infants, where a person, becoming entitled to the charge and the estate, dies during his minority, having by will disposed of the charge. *Chester v. Willis*, Amb. 246. *Powel v. Morgan*, 2 Vern. 90. *Thomas v. Keymiss*, 2 Vern. 348. *Donisthorpe v. Porter*, 2 Eden, 162. S. C. Amb. 600. Even in the case of infancy, it seems necessary, in order to keep the charge on foot, that the infant should manifest an intention that the charge should not merge. See *Powel v. Morgan*, *Thomas v. Keymiss*, and *Chester v. Willis*, *supra*. When a man marries an infant, who is entitled to the fee-simple of an estate as also to a sum of money charged on the same in the event of her marriage, it should seem, that the charge will not merge to the prejudice of the husband. *Stevens v. Bateman*, 1 Bro. C. C. 22. In the case of lunacy, there is no equity in favour of the personal representatives of the lunatic against the heir, to have a charge of this kind raised. *Compton v. Oxendon*, *supra*.

The doctrine under consideration has been further explained by the late case of *Forbes v. Moffatt*, 18 Ves. 384, by which it appears that a mere entry on the land, or an act which savours of ownership, will not be sufficient to shew that the party meant the charge to merge. The question, in the absence of an express declaration, will be, whether it be more for his benefit that the charge should merge than that it should subsist. As for example, if there are subsequent incumbrancers whose liens would acquire priority by a merger of the previous charge, it will be thence inferred that the owner could not intend to divest himself of his priority over the subsequent incumbrancers, and therefore that the charge shall subsist, separate from the estate, for his benefit. Sir William Grant's words on this, are, "It is very clear that a person becoming entitled to an estate subject to a charge

*Latest general
rule is, not to
merge charge
if there be any
collateral ad-
vantage in
continuing it.*

for his own benefit, may, if he choose, at once take the estate, and keep up the charge. Upon this subject, a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserve it, where at law it would be merged. The question is, upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate, and where that is the case, it will be held to sink, unless something shall have been done to keep it on foot. But the owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is, not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it or to continue distinct from it. Where no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. Upon that principle it was held, in *Thomas v. Keymiss*, that it was much more beneficial to the infant that [the estate] should continue personal property, because an infant had the use and disposition of that before twenty-one, but he could have no disposable interest in a real estate till that age. There is a case of *Gwillim v. Holland*, referred to in 2 Ves. jun. 261. 264, where Mrs. Holland had a charge upon an estate which she took by devise from her brother: he had made a mortgage on it: the counsel said, Lord Hardwicke thought that was no merger, because it was more beneficial for her to take it as a charge. Lord Rosalyn said, the intervening incumbrance prevented the merger, and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give a priority to the second incumbrancer." 18 Ves. 384. 389; et vide antea, p. 368, of this edition, *in notis*.

It has been thought that if there are two mortgagees, and the first, in point of charge, purchase the inheritance, he lets in the other on the estate discharged of the prior mortgage. Sugd. Vend. & Pur. 352, n. 4th edition. But this opinion is not only contrary to the principle of *Kennedy v. Daly*, 1 Sch. & Lef. 355, but is in direct opposition to the third point in *Mocatta v. Murgatroyd*, 1 P. Wms. 393, wherein it was laid down, "that though a A. the mortgagee, when there were subsequent mortgages, took afterwards a release of the ultimate equity of redemption, yet this did not oblige the said A. who had taken a release of such equity, to pay the intermediate mortgages, provided he would still waive the release made to him of the equity."

Where there is a charge upon lands, to be raised and paid at a certain future period, and the person entitled to the charge dies before the time arrives, the money will not be raiseable at all, but will sink into the land. *Poulet v. Poulet*, 1 Vern. 204. *Duke of Chandos v. Talbot*, 2 P. Wms. 600, 612. *Elwin v. Elwin*, 8 Ves. 547. *Jennings v. Lookes*, 2 P. Wms. 276. *Bayley v. Bishop*, 9 Ves. 6. Butl. Co. Litt. 237, a. n. (1). Butl. Fearnce, 553, n. 6th edition.

If a mortgage be made by demise for 500 years, and the mortgagee, designing that the mortgagor should release to him his equity of redemption to make the term absolute, obtain a release from the mortgagor, whereby he releases all his right, title, and interest, in the land; such release will extinguish the term for years, and turn it into an estate for life; for no estate being expressed, it will be intended an estate for life only. *Anon*. 1 Freem. 474, pl. 650.

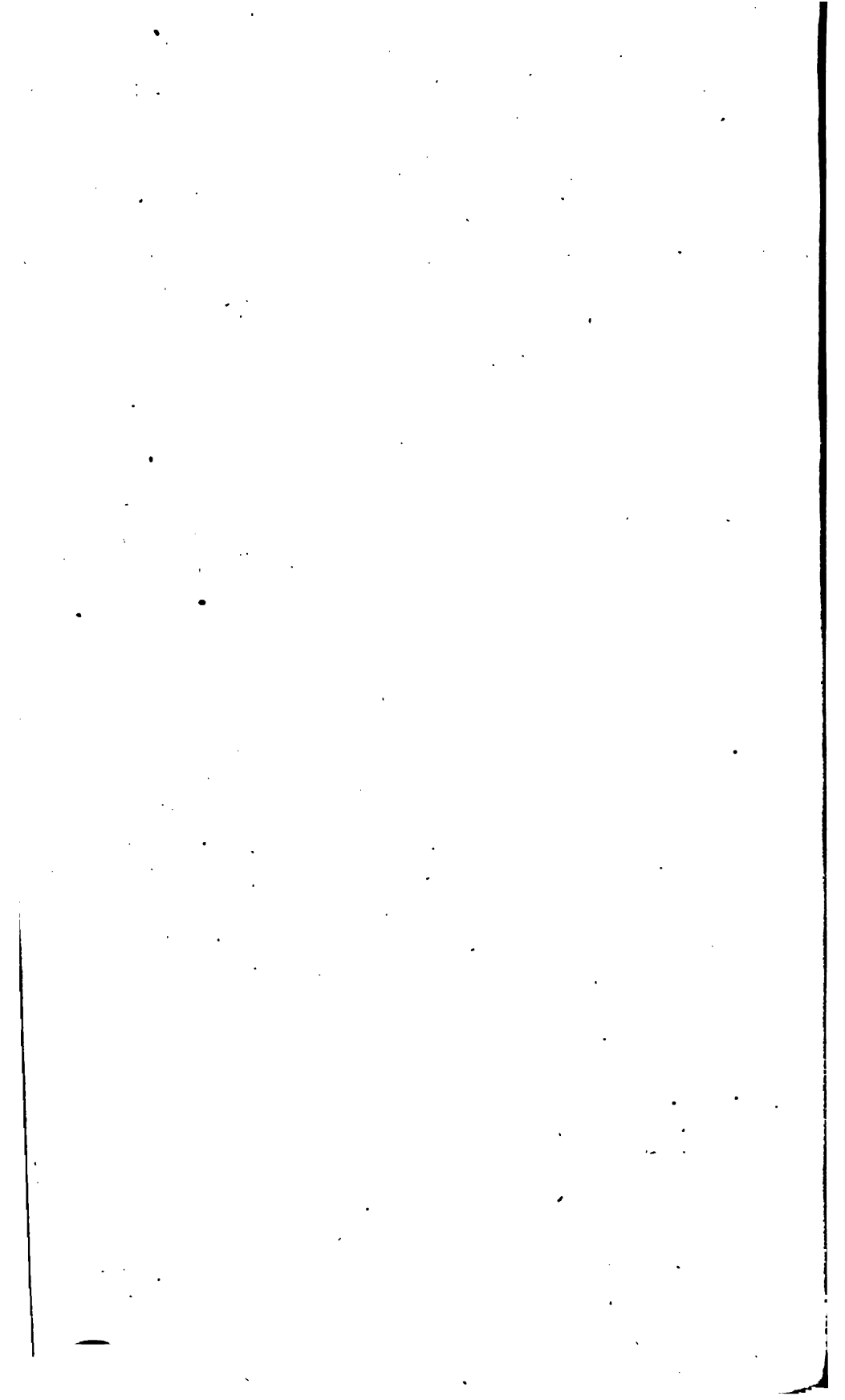
As if it afford infant opportunity of bequeathing money;

Or preserve priority amongst incumbrancers.

Acceleration of charges.

Portion dies with infant portionary.

Release destroys term, and confers life estate.



ADDENDA.

IN 2 Dick. 785, a bond and covenant are said to be of no use if the estate be ample; but for the necessity of a bond or covenant, see *antea*, 61, and 866, of this edition, notes (E) and (X). P. 16. 5th Ed. n.(N)

If a father devise lands to trustees and their heirs, until his son attain the age of twenty-five years, a mortgage by the son, when only twenty-one, is void. *Spencer v. Chuse*, 9 Mod. 30. In another case, it was held, that if an improvident heir takes up goods at an extravagant price, and mortgages to secure it, he may be relieved so far as it stands as a security for the unjust gain; but after it is determined on a *quantum meruit*, what was the real worth of the goods, the mortgage will still be binding on the heir, for so much as is found by the verdict. *Freeman v. Bishop*, 3 Atk. 39. S. C. Barnard. 15. That the expectancy of an heir is not an interest, was acknowledged by Lord Loughborough, C. J. 1 H. Bl. 351; and in *Carleton v. Leighton*, 3 Meriv. 667, the expectancy of an heir, either presumptive or apparent, was held not an interest or possibility capable of being made the subject of [absolute] contract. The mere dealing on an expectancy, induces a court of equity to entertain suspicion and almost to imply fraud, and Lord Eldon is reported to have said, that he was not aware of any case which proceeded on the distinction between such expectancies as were certain, and such as were contingent. *Evans v. Cheshire*, Belt's Supp. to Ves. 305. P. 17. n.(A)

A pledge by the owner, or part owner of a bill of lading, by which the goods are deliverable on payment of freight, who is likewise owner of the vessel, is a pledge of the freight. *Hogg v. Graham*, 4 Taunt. 135. Where A. and B., merchants at Liverpool, wishing to draw on C. and D. bankers and merchants in London, agreed to consign to them, as a collateral security, hemp and iron, to the amount of 10,000*l.* on sale for their account, and afterwards sent to them the invoice and bill of lading indorsed in blank, but the ship was prevented from leaving Liverpool by an embargo, and while the ship was lying at Liverpool, A. and B. became bankrupts; it was held, that the goods belonged to C. and D. and not to the assignees in bankruptcy of A. and B.; for the moment the goods were put on board, and the bill of lading indorsed and remitted to C. and D., the property was changed, and was to remain in their hands, clothed with the trusts expressed in the agreement. *Haillie v. Smith*, 1 Bos. & Pul. 503. So if a mortgagee of a cargo actually take possession of the cargo, but leave the bill of lading with the mortgagor, a *bonâ fide* indorsee of the bill of lading, though subsequent to the mortgage, might oust the title of the mortgagee. *Nathan v. Giles*, 5 Taunt. 558, 564, 574, 575. S. C. 1 Mar. 226. P. 27. n.(J)

In support of this note, see *Scarfield v. Howes*, 3 Bro. C. C. 90. Shep. Touch. 318. *Turner v. Richardson*, 7 East, 340. *Copeland v. Stevens*, 1 Barn. & Ald. 596. *Townson v. Tickell*, 31b. 31. 2 Meriv. 362. though 1 Salk. 301, is, perhaps, contra. P. 32. n.(Q)

Add *Yallop, Ex parte*, 15 Ves. 60. *Kensington, Ex parte*, 2 Rose, 138. *Caldwell v. Gregory*, ib. 149, and *Richardson, Ex parte*, 1 Buck. B. C. 480; et vide *antea*, p. 1084, of this edition, in *notis*. P. 44. n.(H)

The third section of the statute 27 Eliz. c. 4, enacts, that every person party or privy to a fraudulent conveyance, who shall justify the same to be made *bonâ fide* and for valuable consideration, to the disturbance and hindrance of a lawful purchaser, shall forfeit one year's value of the land so purchased, or charged, to be divided between the Queen and the party grieved: and, being thereof convicted, shall suffer half a year's imprison- P. 48. l. 26.

ment without bail. Upon this section it has been resolved, First, that a mortgagee is a sufficient purchaser within this statute; and second, that the entire year's profit shall be forfeited without apportionment on a mortgage, as well as on an absolute sale. So on a lease, or a petty annuity made by fraud. *Boulton v. Wiseman*, Noy, 105.

P. 58. l. 18.

A mortgage will not be set aside from the insanity of the mortgagor after his death, if the transaction remain unchallenged for a length of time; and if impeached within a reasonable period, parol evidence of a general insanity will not be sufficient to vitiate the assurance; to effect that, there must be proof of insanity at the time the mortgage deed was executed. *Tewart v. Sellers*, 5 Dow. P. C. 231. But a committee of an idiot or lunatic, at the discretion and under the direction of the great seal, may raise money on mortgagor of the lunatic's estate for payment of debts, 2 Madd. Ch. 747. 2d edition. The court, however, will never permit any part of the lunatic's estate to be laid out on private security. *Callhorne, Ex parte*, 1 Cox. Eq. Ca. 182. And where a mortgage is paid off out of the lunatic's personal estate, by order of the court, the court will not, during the life of the lunatic, determine whether the payment shall be for the benefit of the lunatic's real or personal representatives, because the question may never arise. The mortgage term will be directed to be assigned in trust to attend the inheritance, or for the lunatic, his executors, administrators, and assigns, as shall thereafter be determined in the matter of the lunacy, or in any suit to be instituted for that purpose. *Earl of Digby, Ex parte*, 1 Jac. & Walk. 640. Vide antea, 285, of this edition, in *notis*.

P. 59. l. 1.

An infant cannot mortgage, but persons executing mortgage deeds will be presumed of age till the contrary be shown. This was the case with Dean Swift. He was an infant when a decree in the cause of *Lefton v. Swift*, 2 Sch. & Lef. 649, was made, but afterwards executed a mortgage deed, and Lord Redesdale, C. said, he must presume the Dean to be then of age, as he executed the deed, and there was no ground for a contrary presumption. The Dean is charged with having practised an imposition, but it was evidently under a mistaken notion of his rights.

P. 102. n. (P)

The deed of mortgage need not state that the money is wanted for the purposes of the will, for in order to vitiate the security, it must be shown that the money was not borrowed for the payment of debts. *Bonney v. Ridgard*, 4 Bro. C. C. 138, cited; et vide *Langley v. Oxford*, Amb. 17. But if a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted. If an administrator mortgage a term of the intestate's, makes A. his executor, and dies, the equity of redemption will not go to the administrator *de bonis non* of the intestate, but to A., the executor of the first administrator; because at law the mortgage was an alienation of the whole term, and the administrator was not possessed *en autre droit*, but in his own right. *Butler v. Bernard*, 1 Ch. Ca. 224. S. C. 2 Freem. 139.

P. 106. n. (A)

The case of *Lowther v. Fletcher*, 7 Vin. Abr. 53, pl. 3, was the case of a papist mortgagee. Lord Parker said, though the mortgage is void by the statute of Wm. 3. yet, as the papist had a judgment which was not an interest in land, and the lands were to be sold under a decree for payment of debts, a court of equity ought to assist a fair creditor (though a papist) in obtaining satisfaction of his debt.

P. 116. text.

In order to constitute a loan, it is requisite that the money be secured at all events. *Lukey v. O'Donnell*, 2 Sch. & Lef. 470.

P. 116. n. (H)

The following cases are relevant to the subject of this note. *Howard v. Harris*, 1 Vern. 190. 2 Ch. Ca. 147. *James v. Oudes*, 2 Vern. 402, and *Seton v. Slade*, 7 Ves. 273.

P. 122. n. (N)

The rule is, not that a trustee is precluded from purchasing from the *cestui que trust*, but that he shall not purchase from himself. The *cestui que trust* may, by a new contract, dismiss the trustee, and then the latter may purchase, but even that transaction will be watched with the most guarded jealousy. *Lacey, Ex parte*, 6 Ves. 625. Yet in *Downes v. Grazebrook*, 3 Meriv. 300, where an estate was conveyed to D. by way of security for the re-investment of a specific sum of stock, and for payment of the dividends in the mean time, with a power of sale in case of default, it was held that if D. exercised his power of sale he would be a trustee for the party making the conveyance, and as such disabled from purchasing for himself without the consent of the *cestui que trust*. The estate in this case had been put up to sale by auction, at which C. as agent for D. was the only bidder, and it was knocked down to him accordingly; but the sale was

decreed not to stand, although no evidence was adduced of fraud or under-value.

If a mortgagee obtain an absolute conveyance, yet suffers the mortgagor to continue in possession, it will again make the transaction a mortgage. *Harris v. Horrell*, Gilb. Eq. Ca. 11. In *Sevier v. Greenway*, 19 Ves. 413, several instruments were construed into a mortgage, though one of them imported to be an absolute conveyance; et vide 2 Fonb. Tr. Eq. 261, 2.

Where the assignment of mortgage premises and of the principal sum due thereon to Trinity College Cambridge in trust for the rector of G. was void, as being executed a twelvemonth before the death of the donor, it was held not capable of being set up, by reference to a will made afterwards, giving the advowson of the living beneficially to the college. *Attorney-General v. Mundy*, 1 Meriv. 327; et vide further on the subject of void bequests of money due on mortgage under the mortmain act (9 Geo. 2. c. 36), *Currie v. Pye*, 17 Ves. 462, and *Attorney-General v. Harley*, 5 Madd. R. 321; and that parochial and paving bonds are within this act, see *King v. Bates*, 3 Price 341.

In a court of law a mortgagor in actual possession of the estate may properly be described as the *mortgagor's tenant*. He is in possession of premises whereof the legal title and interest is in another, and in possession by the permission and sufferance of that other. He is therefore in a court of law, within the strict definition of a tenant at will, and if he be described in a declaration as tenant to the plaintiff, proof of a mortgage deed between them will fully satisfy that description. *Partridge v. Bere*, 1 Dow. & Ry. 273. In this case, Mr. J. Bayley said, a court of law knew nothing about mortgagor and mortgagee. It looked at the legal tenant and it was admitted the mortgagor had the actual possession. The mortgagee had the legal estate, and in a court of law the tenancy of the mortgagor and mortgagee could not be disputed, ib. 274. S. C. 5 Barn. & Ald. 604.

To enable a mortgagor to make a valid lease, he must either obtain a prior re-conveyance from the mortgagee, or procure the latter to concur in the lease. In *Costigan v. Hastler*, 2 Sch. & Lef. 160, it was considered, that the tenant could not, under such an agreement, compel the mortgagor to redeem for the purpose of granting a valid lease; but the circumstances of that case were very special. One Parker being seised in fee of an equity of redemption of lands in mortgage, entered into an agreement to grant a lease to Alley in trust for Hastler. The latter got into possession, and advertised the lands to be let. The plaintiffs offered a rent of £214, and were declared the tenants. A lease for three lives was prepared by Hastler from Alley to the plaintiffs, and executed by the latter, but not by Alley, and was retained by Hastler, under pretence of procuring Alley's signature. The plaintiff entered into possession of part of the premises. Hastler subsequently distrained for rent. To prevent a sale of the distress, the plaintiffs gave three notes of hand to a trustee for Hastler, subject to a settlement of accounts, on which notes, but without a settlement of accounts, actions were brought by Hastler. The original bill was filed by the plaintiffs for relief, praying that the notes of hand might be cancelled, and Alley be obliged to execute the lease. After filing the bill, the mortgagee obtained a decree for sale, and the plaintiffs were put out of possession; on which they amended their bill, and prayed that they might be restored to the possession, or that Hastler should be ordered to pay them the value of their interest in the lands, which had considerably risen in value. The decree was, that the contract for the lease should be set aside, that the plaintiffs should account for the rent due on such part of the lands of which they had had possession during the period of their occupation, that the master should set a fair rent on those lands, and ascertain the amount due at the time of the distress; and it was ordered that the proceedings on the notes of hand should be stayed, and the actions discontinued, and the notes brought into court. The general rule in these cases is submitted in a former note, ante, 712, of this edition.

A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security, and the injunction may be extended to cutting down the under-wood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor may be insolvent. *Humphreys v. Harrison*, 1 Jac. & Walk. 581. So in *Osborne v. Osborne*, 1 Dick. 75, a mortgagor in possession was restrained from cutting down timber on the mortgage premises after some hesitation, the court at first thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession. In

P. 125. n. (P)

P. 141. n. (V)

P. 156. n. (A)

P. 159. text.

P. 165. text.

Hampton v. Hedges, 8 Ves. 105, a mortgagee of timber trees, wood and underwood, moved for an injunction to restrain cutting the underwood; a commission of bankruptcy had issued against the mortgagor; and no assignees had then been chosen. Lord Eldon said, if the mortgagee will not take possession, the mortgagor must cut the underwood in the ordinary course, if at unseasonable times, or of improper growth, his Lordship would grant an injunction. But was there ever an instance of preventing the mortgagor taking the ordinary fruit of the land? Suppose the course was to cut the underwood every seven years; the mortgagor in possession cutting in that way, would not be guilty of waste.—A mortgagee at law may commit waste; and the mortgagor will be without remedy, unless there be an express covenant not to commit waste. *Evans v. Thomas*, Cro. Jac. 172. But in equity a mortgagee will be prevented from committing waste, unless the security appear to be scanty or defective. And where a mortgagee cuts down timber, he must apply it to ease the estate, first the interest, and then the principal of his mortgage. *Witherington v. Banks*, Sel. Ca. Ch. 30. *Hansard v. Darby*, 2 Vern. 392. *Farrant v. Lovell*, 3 Atk. 725.

P. 166. text.

The statute 9 Geo. 1. c. 7, enacts, that no person shall gain a settlement by purchasing any estate whereof the consideration does not amount to 30*l*. *bond fide* paid. Hence, if a pauper contract for the purchase of an estate for 39*l*, which is in mortgage for 32*l*, and having paid 7*l*, takes the conveyance, subject to the mortgage (*Rex v. Mattingley*, 2 T. R. 12) or, if he contract for the purchase of an estate for 52*l*, and pays only 12*l*, but mortgages the property to the vendor for the residue; in either case he will not gain a settlement. *Rex v. Olney*, 1 Maul. & Selw. 38. Yet, if after such purchase at the full value, he obtains from B. an indifferent person, the loan of money, with which he discharges the existing incumbrances on the estate, and takes an assignment of the security, so as to vest the legal estate in himself, and then mortgages to B. for the money lent, and continues in possession for forty days after, the pauper by such arrangement will become entitled to a settlement. *Rex v. Chailey*, 6 T. R. 755. *Rex v. Olney*, 1 Maul. & Selw. 387. *Rex v. Tedford*, Burr. Sett. Ca. 57. If he can gain credit for 30*l*. the Court will not enquire from whence it comes. *Rex v. Tedford*, ib. and 1 Maul. & Selw. 390, 391.

P. 170. n. (T)

In addition to the observations made in p. 160, ante, et seq. as to the statute 7 Geo. 2. c. 20, it is open to further remark, that where after judgment for the plaintiff in ejectment the mortgagor prayed to bring the money into court under this statute, the application was refused, Page and Chapple, Justices, observing, that though liberty be given to bring in the money pending the action, yet, after the suit has been determined by judgment, the court cannot comply with the mortgagor's motion. *Wilkinson v. Traston*, Serjeant Leeds MS. 2 Selw. N. P. 683, 5th edition. Before a court of law will proceed on this statute, there must be an affidavit that no suit in equity is depending, ib.; and a defendant, in order to stay proceedings at law under an ejectment, must apply before the plaintiff is entitled to take out execution. *Amis v. Lloyd*, 3 Ves. & Bea. 15. Where the title-deeds and mortgage are not delivered up, the money must be paid into court, unless the plaintiff or his attorney will undertake to deliver them. *Danden v. Jacob*, Tidd's Prac. 563, 7th edition. If there be any doubt as to the amount of what is due, the court of King's Bench will refer it to the Master, and the court of Common Pleas to one of the prothonotaries who taxes the costs: *Berthen v. Street*, 8 T. R. 326. And where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession, (the ejectment being brought for the residue,) and it was prayed that the prothonotary might be directed to make allowances for such repairs, the court said, that the rule must follow the words of the statute, and that the prothonotary would make just deductions and allowances; *Barnes*, 176. Adams Ej. 294. In a case where the mortgage deed enabled the mortgagee to sell, and upon an ejectment and a rule obtained upon the statute, the mortgagee having set up a claim for some expenses occasioned by sale under the mortgage deed, the Chief Baron observed, that the only charge specified was of a nature which might be very well settled by reference to the Master, and accordingly the rule was made absolute. *Goodtitle v. Lonsdown*, 3 Austr. 937. It has also been holden that the rule, with respect to tacking in an ejectment, shall be the same as in equity. Therefore, upon a reference to the Master, the court has refused to tack a bond debt to the mortgage as against the mortgagor or his assignee of the equity of redemption, but has

intimated that it might be done against the heir. *Bingham v. Gregg*, Barnes, 182. And it has been decided in equity, that if the bill embraces any object distinct from the foreclosure of the mortgage, as for example, if it sets up another demand on the defendant, and prays it may be also a charge on the estate, no order of reference can be made under the statute. Lord Eldon has remarked, that the justice of the case seems to be, that the reference should be made as to the mortgage, and the cause go on as to the rest, but he had never known it done. *Bastard v. Clarke*, 7 Ves. 489.

That a lessee should enquire for his lessor's title, see *White v. Foljambe*, P. 176. n. (F) 11 Ves. 337, and 12 Ves. 249, arg^o 250.

So in an anonymous case in 2 Freem. 253. a mortgagee of a building lease, (the lessee having died insolvent,) was decreed to build on the ground, and not to quit the lease, though content to lose his money. P. 178. l. 32.

If the mortgagor obtain a renewal, or the grant of a fresh term in remainder, without the privity of the mortgagee, such fresh term will be considered a trust for the mortgagee. And though the mortgaged lease may be expired by efflux of time, still the fresh term must be assigned to the mortgagee to hold till the debt is satisfied. *Luckin v. Rushworth*, 2 Ch. Rep. 113. Finch, 392. 6 Mod. 57. Where the title to a term which was in mortgage proved to be defective, and the owner of the estate, out of compassion to the lessee, (who had built on the premises and absconded in debt,) demised for a long term to trustees for the benefit of his (the mortgagor's) wife, the Master of the Rolls considered the new term as a graft into the original stock, and the benefit of it above the rent reserved, as arising in consideration of the former title, and therefore decreed the trustees to make a new mortgage to the mortgagee. *Seabourne v. Powell*, 2 Vern. 11. P. 190. text.

The tenant right of renewal is a part of the tenant's interest in the lease. P. 195. n. (U) *Winslow v. Fiske*, 2 Ball & Bea. 205.

A mortgagee has such an interest in the land, that he may interfere in all actions and suits respecting it. Thus, if it be an action of ejectment at law, he may come in and be made a defendant together with the former defendant. *Doe v. Cooper*, 8 T. R. 645. And if there be a suit in equity he may come in and be examined *pro interesse suo*. *Fawcett v. Fothergill*, 1 Dick. 19. *Cooper v. Thornton*, ib. 72. *Hemlyn v. Lee*, ib. 94. *Boules v. Parsons*, ib. 142. So if there be a decree against the mortgagor, he may appeal in the mortgagor's name to the House of Lords against the decree: *Daly v. Kelly*, 4 Dow. P. C. 17; et vide antea, 203, of this edition. P. 203. n. (G)

An infant mortgagee is not a trustee for the mortgagor only, but also for the executor of the mortgagee. One of the inconveniences that the statute of Anne intended to remedy, was, that the executor should not wait for his money till the full age of the heir. Hence it follows, that the executor of the mortgagee may apply for a conveyance from the infant as well as the mortgagor. *Holeworth v. Lane*, Mosl. 197. We have seen, that an infant mortgagee is within the statute, notwithstanding he may be beneficially interested in the mortgage money, antea, 205, of this edition, n. (K). To the cases there cited, add *Bellamy, Ex parte*, 2 Cox, 422. *Chandler v. Beard*, 1 Dick. 392. *Benton, Ex parte*, ib. 394. *Carter, Ex parte*, 5 Madd. 81, and *Ward, Ex parte*, ib. 291. A mortgagee in fee devised to three persons, and the survivor of them, and the heirs of such survivor. The infant heir of the testator was directed to join in reconveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Harrison's Ca.* 3 Anstr. 836. P. 205. n. (K)

By the 1st & 2d Geo. 4. c. 114, a conveyance may be directed of the estate of an idiot or lunatic, trustee, or mortgagee, before such idiot or lunatic shall have been found so by inquisition; over-ruling the conclusion from *Gillam, Ex parte*, 2 Ves. jun. 587, stated in this note. P. 211. n. (N)

The unreported case of *Johastone v. L.*——, mentioned in this note, is stated in Sug. V. & P. 561. 570, 5th edition, by the name of *Johason v. Lingard*, and reported fully, 3 Madd. 283. It must of course over-rule that part of *Pulvertoft v. Pulvertoft*, 18 Ves. 84, which held, that a limitation to brothers or other relations was within the scope of the settlement and therefore not voluntary; et vide *Holloway v. Millard*, 1 Madd. R. 418. P. 212. n. (O)

In this note it is stated that the mortgagor, on paying off the mortgage, can never be liable to see his money applied. This must be confined to cases where the mortgagee has bequeathed the money on trusts and appointed an executor, or died without a will whereby the right to the money devolves on the administrator. If the mortgagor have notice that the money borrowed is settled on certain trusts by a particular deed, he P. 214. n. (A)

certainly will be bound in equity to see to the application of his money on paying it in, unless he be expressly or impliedly exempted from that obligation by a provision in the trust deed. It is therefore essential to conceal the trust of money advanced from the knowledge of the mortgagee.

P. 217. n. (D) The statutes and law proceedings of the reign of Charles 2, appear to be all dated from the year 1649, but this will not reconcile the inaccuracy in the date of the case of *Culpepper v. Aston*.—Anthony Ashley Cooper, afterwards Earl Shaftesbury, was Lord Chancellor about eleven months in the year 1673, 9 Hume Hist. Eng. 117, Dued. edition; which may probably have occasioned the mistake in the name of Ashby.

P. 225. n. (s) The case of *Bryson v. Goltine*, is erroneously stated in 2 Bro. C. C. p. 323, and 2 Dick. 697. A more correct statement may be found in 1 Sch. & Lef. 236.

P. 247. n. (A) An estate of freehold may be disclaimed by deed without matter of record. *Turnson v. Tiskell*, 3 Barn. & Ald. 31; et vide supra, 1091, of this edition, p. 32, n. (Q).

In a late case, bonds were devised to two trustees and their heirs, upon certain trusts; one wishing to decline, renounced probate of the will (they being also executors); and by indenture of release "bargained, sold, released, quitted claim, and conveyed," to his companion and his heirs, all and singular the lands and real estate, late of the said testator. On this instrument a question arose, whether the trustee, intending to disclaim, had not accepted the trust, by taking upon himself to convey. Lord Eldon thought the reasoning on which this objection was raised, was much too technical for a court of equity. If the essence of the act were disclaimer, a release whereby a person declared that he would not take as trustee, gave the best evidence that he would not take as trustee. It was true that a release was the instrument of a person who thought he had something to part with; it was not a mere dissent or refusal to concur, but there was no case on the distinction between a disclaimer and a release, and his Lordship was of opinion that there ought to be no distinction. A decree was then taken by consent that the release operated as a disclaimer, and that the concurrence of the renouncing trustee was not necessary. *Nicholson v. Wordsworth*, 3 Swanst. 366. In *Smith v. Wheeler*, 1 Vent. 128. S. C. 2 Keb. 773, a lease was assigned by deed to B. and C. of whom B. dissented, Lord Hale said C. was a good lessee, for the other trustee's disagreement made the estate wholly his. In the above case of *Nicholson v. Wordsworth*, the trustees were appointed by will, and though there is no ground for a different line of argument, where they are appointed by deed, yet Lord Eldon, in that case, particularly referred to the difficulty of applying his reasoning to the case where they were appointed by a conveyance to uses, saying that he thought Lord Hale's doctrine would not apply to such an instance, and that the party could not disclaim in the case of a conveyance to uses except by release with intent of disclaimer. If he were to say that a disclaimer would not be effectual he should shake innumerable titles. 3 Swanst. 372.

P. 263. n. (E) When the estate is in mortgage prior to a judgment, or if the legal estate be in any manner out of the debtor when the judgment is obtained, so that the creditor could not recover under an *elegit*, a court of equity, in order to protect a purchaser, will not permit the creditor to redeem, *Barred v. Blake*, 2 Ball & Bea. 357.

P. 265. n. (G) An infant heir, as distinguished from an infant purchaser of lands, subject to the custom of gavelkind, may alien absolutely by feoffment at the age of fifteen years; but it was the opinion of a very eminent conveyancer in a recent case, (after referring to the doubt in *Robinson*, p. 217,) that a gavelkind tenant by descent could not mortgage until twenty-one, or dispose of his lands while under that age, for any other purpose than on sale for valuable consideration.

P. 274. n. (O) On the subject of searching for judgments, it may be useful to add a case before Lord Kenyon, at Nisi Prius, where his Lordship said, that an abstract ought to mention every incumbrance whatever affecting an estate upon which any security is about to be placed; and should, therefore, contain an account of every judgment by which the estate is affected. That the abstract, therefore, in the case before him, was objectionable in that respect; nor was the difficulty removed by the offer to have satisfaction acknowledged under a power of attorney, as that was liable to objection; and it had been decided by Lord Hardwicke, that a party was not bound to accept of any conveyance or any agreement executed under

such circumstance. That, with respect to the searching for judgments, the conduct of the plaintiff's attorney had been perfectly proper; for as it was absolutely necessary to search for judgments immediately before the conveyances were executed, lest some judgments should have been entered up during the treaty, he had assigned a very proper reason for not having done so at first, namely, the plaintiff's assertion that no judgment did in fact subsist charging the estate, except one for 1000*l.* before mentioned, and it saved the expence of a double search for judgments. Accordingly, his Lordship ruled that the plaintiff, having discovered another judgment for 5000*l.*, besides that for 1000*l.* above mentioned, and thereupon declined to proceed in advancing his money, was entitled to recover the expences of the conveyance with interest, from the time the plaintiff had prepared it to the time that the treaty was at an end. *Richards v. Barton*, 1 Esp. 268.

In a former note (antea, 278; of this edition) some enquiries have been made whether a court of law will interpret the statute of Wm. & Mary, in regard to notice, in the same manner as a court of equity. Lord Kenyon appears to have taken one view of the subject, and Mr. Justice Buller another, so that nothing conclusive could be advanced on the subject. A late case on the registry acts may be considered as settling the question, and deciding that actual notice at law will not bind the party with a judgment which has not been duly docketted. Lord Talbot has said, that a court of equity will not differ from a court of law in the exposition of statutes; *Ca. Temp. Talb.* 39; but that rule must now be considered as obsolete, however consonant it may appear to equity, justice, and reason. The case alluded to was this: There were two assignments of the same leasehold premises in the county of Middlesex; the last was registered first, but the second assignee had full knowledge when his deed was delivered, that a prior assignment had been made. For him it was contended that a subsequent purchaser for a good consideration, having registered his title first, was to be preferred before the prior purchaser; and that as to the knowledge of the prior conveyance, it would make no difference at law; all that it would do, was, perhaps, to entitle the defendant to relief in equity. The Lord Chief Justice delivered his opinion in the following terms:—A court of law is now called upon, for the first time, to put a construction on the words of the statute 7 Anne, c. 20. s. 1, by which it is enacted, that every deed or conveyance that shall, after the 29th September 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim. It is impossible that plainer words could be used, and I think, that, sitting in a court of law, we are bound to give effect to them; and that we cannot say that this deed is not fraudulent and void within the meaning of the act, because, possibly, it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shews clearly how inconvenient it would be, if this court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it is at least a fit matter for its consideration. We, however, in a court of law, must give effect to the words of the act.—Bayley, J.: I am of the same opinion. The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words "*bonâ fide* purchaser" are not used.—I think therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the Judges in the cases cited, although they thought that a court of equity would, in some cases, interfere to relieve the party. It is so laid down by Lord Hardwicke, in *Le Neve v. Le Neve*; and the words of Lord Mansfield, in *Doe v. Rostledge*, Cowp. 712, are these, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have." He therefore puts it as a case in which equity would interfere; and the circumstances of this case shew the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice if we were to decide in favour of the defendant.—And per Best, J.: The words of the statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me that the case of *Le Neve v. Le Neve*, in which Lord Hardwicke considers the party under these circum-

P. 278. a. (O)

stances as entitled to relief in equity, is an authority to shew, that at law he is without defence. Judgment was accordingly given for the second assignee. *Doe v. Alsop*, 5 Barn. & Ald. 142. As to the equitable consideration of the case, see ante, 624, of this edition, n. (N).

P. 284. *tert.*

Trustees or executors for infants, who are not expressly authorised to invest on real securities, cannot lend trust monies on mortgage of lands, without an express order of the court; and the court will not make an order for that purpose, unless under very special circumstances, as where there is a mortgage or charge on the infant's estate. *Norbury v. Norbury*, 4 Mad. 191; et vide *Terry v. Terry*, Gilb. Eq. Ca. 10. Where a charge is paid off, or a mortgage redeemed with an infant's personal property, it will in general be ordered that it be considered as personal estate for the benefit of the infant, but it does not appear that any such order has ever been made with respect to timber cut on the infant's estate. See *Bronsfeld, Ex parte*, 3 Bro. C. C. 515.

P. 305. n. (E)

A receiver of rents of estates conveyed to secure an annuity, was discharged on acceptance of the price of the annuity with interest deducting the past payments. *Davis v. Duke of Marlborough*, 2 Swan. 108, et vide *Langley v. Hawk*, 5 Mad. 46. If a tenant for life refuse to shew title-deeds, which are in his possession, so as to enable trustees under a settlement who have power to mortgage, to make a mortgage, the court will appoint a receiver. *Brigstocke v. Mansel*, 3 Mad. 47. The court will appoint a receiver of the rents of lands in mortgage pending a bill to foreclose. *Crowe v. Halliday*, 2 Ridgw. P. C. 58.

P. 338. n. (U)

The Lord Chancellor's judgment in the case of *Postlewaite v. Blythe*, has recently been reported; the following are the material parts of it:—"The rules of the court, with regard to mortgagees, have been strongly impressed on my mind by the conduct of two distinguished practitioners. Mr. Lloyd constantly protested, that he never would, on the part of a mortgagee, consent to a sale; and the late Mr. Maddocks, who was himself a mortgagee for 20,000*l.* on a Welsh estate, refused his concurrence in a sale, to the great dissatisfaction of Lord Thurlow. They both maintained, one on behalf of his client, the other, of himself, that the mortgagee was entitled, before he relinquished the estate, to have the money not in the hands of the accountant-general, but in his own. It was not till a late period, that it was contended that a mortgagor was bound to shew his mortgage deeds to a person contracting for the purchase of the estate. See *Anon. Mos.* 246. The mortgagor is entitled to say to the intended purchaser, that if he chooses to take his chance of title, he may, on payment of the mortgage-money, have a conveyance. The general doctrine of the court is, that if the party claiming to redeem will take the mortgagee's word for the sum due, and will pay it, the mortgagee must convey; but when the mortgagee states a certain sum to be due, the court will not order him to re-convey on payment of that sum into court; placing him in the situation, that if that sum is more than sufficient to satisfy his demand, he shall not have the surplus, if not sufficient, he shall have only personal security for the difference." *Postlewaite v. Blythe*, 2 Swan. 257.

P. 370. n. (B)

There is no stint to the redemption of a mortgage if interest be paid, or it be in any other way acknowledged; per Lord Keeper, 1 Ch. Ca. 102; and a court of law will presume that interest has been paid for thirty-seven years, if the special verdict express nothing to the contrary, *Hall v. Doe*, 1 Dow. & Ry. 340. *infra*, App. No. xxvi. So, if a mortgagee convey, subject to the equity of redemption, that right may be kept alive for any length of time. *Doe v. Parratt*, 5 T. R. 655. A mere private account kept by the mortgagee of the profits of the estate, in which he treats the estate as redeemable, will be a sufficient circumstance whereon to decree a redemption. *Fairfax v. Montague*, 2 Ves. jun. 84, cited; *Campbell v. Backford*, 4 Ves. 474, cited.

P. 372. n. (D)

Where, upon a demand made, the answer was, "I will not pay you unless I am obliged," this was held a sufficient acknowledgment to take the case out of the statute of limitations, *Dowthwaite v. Tibbut*, 5 Mau. & S. 75. The statute of limitations begins to run against an administrator from the time of administration granted. *Murray v. East India Company*, 5 Barn. & Ald. 204.

P. 409. n. (D)

So, in *Woodhouse v. Meredith*, 1 Meriv. 450, where I. W. being seized and possessed of considerable freehold, copyhold, and leasehold estates in the county of H., and being in possession, as mortgagee of certain leasehold houses at K., in the county of M., but having no other property in the said county of M., and having other estates vested in him as mortgagee,

besides those at K., made his will, dividing all his freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K. to A. W. for life and, after her death, all and singular other his freehold, copyhold, and leasehold messuages, &c. in the county of H. and M., or elsewhere, to E. W. and A. T., for their joint lives; and, after their several deceases, all the said freehold, leasehold, and copyhold messuages, lands, tenements, and hereditaments, unto and equally among their children, and gave to A. W. all the residue of his real estate not before disposed of, and all other his estate and interest whatsoever, vested in him as mortgagee or trustee, and all the residue of his personal estate, ready money and securities for money, subject to the payment of debts and legacies, it was held that the mortgaged premises at K. passed under the devise of all the freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K.

Whether the wilful concealment by a creditor of his debt (otherwise good) from the parent of a woman on a treaty of marriage between her and the debtor, will alone be sufficient to postpone the debt, was made a *quære* in *Scot v. Scot*, 1 Cox, 367, a case of the most flagrant fraud. P. 438. text.

Proviso, that if money be paid at a certain day, term shall cease; payment of the money after the day will cease the term, 1 Bligh Rep. 107, n. P. 491. n. (A)

In *Putland v. Burrows*, 3 Bro. P. C. 71, a tenant for life pretending to be seised in fee, made a mortgage in fee for 3000*l.*, and fines and recoveries were levied and suffered by him and his wife to the uses of the mortgage-deed. The mortgagee, upon his son's marriage, conveyed the mortgage lands, subject to the proviso for redemption to uses in strict settlement and died. The mortgagee's son filed a bill for foreclosure against those claiming under the mortgagor. The defendants admitted the mortgage, but insisted on a settlement made previous thereto, whereby A. was only tenant for life. They called no witnesses to prove the settlement, or any copy or notice thereof on the mortgagee, wherefore an account was ordered in the Lords, contrary to a decree in the court below, which decree was reversed, 3 Bro. P. C. 81. P. 637. text.

A plea of the statute of 32 H. 8. c. 9. s. 3, against buying and selling pretended titles, and also that there was not any mortgage as mentioned in the bill, to a bill that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff, has been held good, though a negative plea. *Hitchens v. Lander*, Coop. Rep. 34. P. 664. n. (C)

On the death of the mortgagee, the money belongs to his executor or administrator, though the mortgagee be in possession at the time of his death, and the estate descends to his heir. *Noy v. Besantance*, Finch, 305. P. 662. text.

Where a mortgagee devises to husband and wife in fee, treating the property as real estate, it survives to the wife against the husband's sole conveyance. *Doe v. Parratt*, 5 T. R. 652. P. 715. n. (K)

A. being indebted to B., lodges several securities for money with him as collateral securities for that debt. A. afterwards borrows a further sum of money of B. for which C. becomes his surety. A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B., being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in the reduction of the second debt. *Praed v. Gardner*, 2 Cox. Ca. Eq. 86. Where A. mortgaged a tenement to B., and C. and D. were sureties for payment of the principal and interest, and afterward 1*l.* interest being in arrear, C. paid it to prevent a suit; and then D. lent money to A. and it was proposed that the equity of redemption should be his security; upon which C. desired that D. would include his 1*l.* in the security; which D. added accordingly, and gave C. a note to assure him in satisfaction thereof; D. being a considerable creditor to A., insisted, that C. should have no satisfaction until his own money was first reimbursed. C. died; his widow being his executrix, exhibited her bill against D. and insisted upon having satisfaction before him, the money being due to her precedent to his demand. The defendant alleged that the acceptance of the note was a waiver of the first equity. *Lord Chancellor*.—C. having paid 1*l.* for interest, he stands in the place of B. the mortgagee, and shall have the benefit of that security; and as to the note it is not any waiver, but an additional security. *Beckett v. Booth*, 2 Eq. Ca. Abr. 593, pl. 7. Where a creditor, having a joint bond from his debtor and a surety, took a mortgage from the principal for part of the debt, and agreed to receive the residue by instalments, which were secured by a warrant of attorney to confess judgment; the same however, to be without prejudice to any security, the P. 871. n. (C)

creditor then held; an injunction was granted to restrain the creditors from suing the surety, on the ground that the warrant of attorney and mortgage superseded the bond. *Boulbee v. Stubbs*, 18 Ves. 20, et vide S. L. in *Melling v. Crickett*, 1 Jno. Wils. 418.

P. 902. n. (M)

But if mortgage money be secured to be paid by instalments, and also by a warrant of attorney, the condition of which is, that no execution shall be issued until default is made in payment, one default will entitle the mortgagee to take out execution for the whole money; for, per Dampier, J. "I doubt much if, in point of law, the party could take out a second execution" for the same debt. *Leveridge v. Forty*, 1 Man. & S. 706.

P. 920. n. (E)

If a debt be agreed to be paid at a certain day, the rate of interest will be 5l. per cent. from that day; but, if it be payable on demand, the interest will be 5l. per cent. from the demand. *Upton v. Ferrers*, 5 Ves. 803. *Lowndes v. Collins*, 17 Ves. 27. A note payable at a day uncertain on a shop debt carries no interest; *Parker v. Hutchinson*, 3 Ves. 135, unless there be some particular ground for it; as where the debtor has done something treating them as specialty debts, such as annexing a schedule of them to his will, or to a trust deed. *Stewart v. Noble*, Vern. & Scriv. 528. *Barwell v. Parker*, 2 Ves. 364. But if a man devise his estates for payment of debts, and his simple contract creditors file bills for a mortgage or sale, the simple contract debts will carry interest from the time of the master's report being confirmed. *Lloyd v. Williams*, 2 Atk. 108. S. C. Barn. Ch. Rep. 224. An equity attaching to a bond attaches also to interest paid on it, and where the Court orders a bond to be cancelled, it will also order the interest paid on it to be refunded. *Hitchcock v. Giddings*, 4 Pri. 135.

P. 934. n. (R)

The interests of mortgagor and mortgagee are perfectly distinct, and that distinction is very familiar to courts of equity. The mortgagee is not, in any respect, under the control of the mortgagor; nor could he be compelled to receive his money, even at the expiration of six months notice; for then he might have driven the mortgagor into equity to redeem the estate. Per Richards, B. in *King v. Abbott*, 3 Pri. 196. But if a bill were brought, a much greater delay and more difficulties would of course occur. *Casburne v. Scarfe*, 2 Jac. & Walk. 199.

P. 957. text.

Lands were limited by marriage settlement upon failure of issue male, to daughters and their heirs, until the next remainder-man should pay them 3000l; there being no sons and four daughters, they entered. The Master of the Rolls decreed that they should account for the profits, and that the rents should be applied, first, to pay the interest, and then to sink the principal, as in the case of a common mortgage, which decree was affirmed by the Lord Chancellor, with this variation, that the principal should not be sunk, till a third part was raised above the interest, and so again, when another third part was raised. *Blagrove v. Clum*, 2 Vern. 523. 576.

P. 959. l. 21.

So, where a mortgagee in possession had been over-paid by the rents and profits which he had received, the court decreed him to pay interest for the annual balances in his hands. *Sherlock v. Lowe*, Irish T. R. 604, cited; et vide *Tebbs v. Carpenter*, 1 Mad. Rep. 290.

P. 966. n. (G)

Bail may be put in on an action of debt brought by a mortgagor against mortgagee for the mortgage money. *Gidden v. Drury*, Farresley's R. 139. S. C. 7 Mod. 139. Holt, 401. 15 Vin. Abr. 442, pl. 20.

P. 1004. l. 15.

And where a bill to foreclose had been filed in Ireland, and the court made a decree, and ordered the mortgaged lands to be sold according to the usual course, and afterwards a third person who had paid off the mortgage and taken an assignment thereof and of the decree of foreclosure, applied to the court to set aside their order for a sale, the Irish court of Chancery refused the motion, whereupon the assignee appealed to the Lords, by whom the order of refusal was affirmed, with costs. *Crowe v. Halliday*, 2 Ridgw. P. C. 50.

APPENDIX

OF

PRECEDENTS.

No. I.

COMMON FORMS.

Of Recitals, Considerations, Parcels, General Words, Reversion, Estate, Deeds, Powers, Provisoes, and Covenants.

RECITALS.

1. *Seisin in Fee.*

WHEREAS the said (*mortgagor*) is seised of, or well and sufficiently entitled to, the inheritance in fee simple, of and in the message or tenement and hereditaments hereinafter described, and also released or otherwise assured or intended so to be, with the appurtenances.

2. *Seisin in Tail.*

WHEREAS the said (*mortgagor*) is tenant in tail of the messuages or tenements and hereditaments hereinafter released, or otherwise assured or intended so to be.

3. *Seisin for Life.*

WHEREAS under or by virtue of certain indentures of lease and release, bearing date, &c. and made, &c. the said A. B. is tenant for his own life, of the messuages or tenements and hereditaments hereinafter mentioned, and intended to be hereby demised, with the appurtenances.

4. *Mortgagor's Occasion to borrow Money.*

AND WHEREAS the said (*mortgagor*) having occasion to borrow and take up at interest the sum of 500*l.* hath applied to and requested the said (*mortgagee*) to lend and advance him the same, which he the said (*mortgagee*) hath consented and agreed to do, on having the re-payment thereof with interest secured to him—in manner hereinafter mentioned—or, by a mortgage of the said message or tenement and hereditaments, in manner hereinafter mentioned, and by a bond and warrant of attorney to confess judgment thereon.

5. *Another Form.*

AND WHEREAS upon the application and at the instance and request of the said (*mortgagor*), and for his accommodation, the said (*mortgagee*) hath agreed to lend and advance unto the said (*mortgagor*) the sum of 800*l.* on the security of a mortgage of a copyhold message and other hereditaments, situate at B. aforesaid, and hereinafter described and covenanted to be surrendered or otherwise assured, or intended so to be.

6. *That Tenant for Life has Occasion to borrow.*

AND WHEREAS the said A. B. having occasion for the sum of 700*l.*, hath applied to and requested the said (*mortgagee*) to lend and advance him the same, which the said (*mortgagee*) hath consented and agreed to do, on having the said messuages or tenements and hereditaments assigned to him for a term of 99 years, determinable on the said A. B.'s decease, in manner hereinafter mentioned.

7. *That Trustees have Occasion to borrow to pay Debts and Legacies.*

AND WHEREAS on the application and at the instance and request of the said (*trustees*) the said (*mortgagee*) hath agreed to advance and lend them the sum of 7000*l.* for the purposes of the said will, on having the repayment thereof with interest secured to him by a mortgage of the said messuages or tenements and hereditaments, for the residue of the said term of 500 years, in manner hereinafter mentioned; and the said (*tenant for life*) hath agreed to join in the same mortgage, and to enter into the covenants hereinafter contained, and to execute a bond given and entered into, or to be given and entered into, for better securing the said sum of 7000*l.* and interest.

8. *Mortgagor's Occasion to borrow in Welsh Mortgage.*

AND WHEREAS the said (*mortgagor*) having occasion for the sum of 300*l.*, hath applied to the said (*mortgagee*) to lend him the same, which he hath agreed to do, on having a conveyance made to him of the said lands and hereditaments and immediate possession given to him thereof, to the intent that he may be repaid the same sum of 300*l.* with interest after the rate of 5 *per cent. per annum*, out of the rents and profits of the said hereditaments, in manner hereinafter expressed.

9. *Loan of Stock.*

AND WHEREAS the said (*mortgagee*) having the sum of 1000*l.* 3 *per cent.* consolidated bank annuities standing in his name, in the books of the Governor and Company of the Bank of England, the said (*mortgagor*) applied to and requested him to lend and advance him the same, which he the said (*mortgagee*) hath consented and agreed to do, on having the re-transfer of a like sum of 1000*l.* 3 *per cent.* consolidated bank annuities, and payments in the mean time in lieu of, and equivalent to, the dividends which he would have been entitled to receive in case he had continued a sum of 1000*l.* in the said stocks or funds, secured to him in manner hereinafter mentioned; and the said (*mortgagee*), in pursuance of the said agreement, hath this day transferred the said sum of 1000*l.* 3 *per cent.* consolidated bank annuities, unto and into the name of the said (*mortgagor*), in the books of the Governor and Company of the Bank of England, as he the said (*mortgagor*) doth hereby admit and acknowledge, testified by his execution of these presents.

10. *Another Form.*

AND WHEREAS the said (*tenant for life*) having occasion to borrow and take up at interest the sum of 1600*l.*, hath applied to and requested the said (*trustees*) to lend and advance him the same, which they have consented and agreed to do, out of the said trust monies so vested in their names in the books of the Governor and Company of the Bank of England as aforesaid, on this express agreement, that the said (*mortgagor*) shall secure to them the said (*trustees*), their executors, administrators, or assigns, the re-transfer of such a sum of 4 *per cent.* consolidated bank annuities, as they shall sell out to realise the said sum of 1600*l.* in manner hereinafter mentioned. AND WHEREAS, in pursuance of the said agreement, the said (*trustees*) have this day sold out and disposed of the sum of 1706*l.* 4 *per cent.* consolidated bank annuities, and the clear produce thereof, at 94 *per cent.* amounted to 1609*l.* sterling, and a fraction.

11. *Further Sum advanced.*

WHEREAS the said (*mortgagee*) hath, since the execution of the said recited indenture, lent unto the said (*mortgagor*), the sum of 500*l.* in addition to the sum of 800*l.* therein mentioned and intended to be thereby secured.

12. *Agreement for Mortgage and Settlement of Equity of Redemption.*

AND WHEREAS on the application and at the instance and request of the said (*mortgagor*) the said (*mortgagee*) hath agreed to advance and lend to the said (*mortgagor*) the sum of 600*l.*, upon the security of a mortgage of the said messuage or tenement and hereditaments, and for the more effectually securing the re-payment of the said sum of 600*l.* and interest to the said (*mortgagee*), and for settling and assuring the equity of redemption of the said premises to the uses, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared, of and concerning the same, the said (*wife*) hath consented and agreed to join in the fine hereinafter covenanted to be levied, for the purpose of barring and extinguishing her dower, right, and title of dower, and thirds, of, in, and to the said messuage or tenement or hereditaments, in manner hereinafter mentioned.

13. *Contract for Purchase of Equity of Redemption.*

AND WHEREAS the said (*purchaser*) hath contracted and agreed with the said (*mortgagor*) for the absolute purchase of the messuage tenement and hereditaments comprised in the said recited indenture of mortgage, and of the right and equity of redemption of him the said (*mortgagor*) of, in, and to the same, and the fee simple and inheritance thereof, free from all incumbrances except the said recited indenture of mortgage, at or for the price or sum of 1800*l.* and the same messuage or tenement and hereditaments are now intended to be conveyed and assured to him in manner hereinafter mentioned.

14. *Contract for Purchase, and that Mortgagee has agreed to advance Part of Money on Security of Premises.*

WHEREAS the said (*purchaser*) hath contracted and agreed with the said (*vender*) for the absolute purchase of the fee simple and inheritance of the lands and hereditaments hereinafter described, and also released or intended so to be, at or for the price or sum of 5,000*l.* free from all incumbrances (except as hereinafter is excepted). AND WHEREAS it not being convenient for the said (*purchaser*) to pay the whole of the said purchase money at present, he hath requested the said (*mortgagee*) to lend and advance him the sum of 3000*l.* on security of the said hereditaments, which he the said (*mortgagee*) hath consented and agreed to do: to effectuate which security, and convey the said hereditaments to the uses and upon the trusts hereinafter

expressed, the said (*purchaser*) with the concurrence of the said (*mortgagee*), hath desired the said (*vendor*) to convey and assure the said hereditaments and premises so agreed to be purchased as aforesaid, unto the said (*trustee*), and his heirs, to the uses, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared, of and concerning the same.

15. Another Form.

AND WHEREAS the said (*purchaser*) hath contracted with the said (*vendor*), for the absolute purchase of the fee simple and inheritance of all and singular the said lands and hereditaments, at or for the price or sum of 5000*l.*. AND WHEREAS the said (*purchaser*) hath requested the said (*mortgagee*) to lend him the sum of 2000*l.* to enable him to complete the said purchase, which he has consented to do, on having such conveyance and assurance made to him of the said lands and hereditaments, and such bond or obligation of the said (*purchaser*) for repayment of the said sum of 2000*l.* and interest as are hereinafter expressed, declared, and contained.

16. Power to Mortgage.

WHEREAS in an indenture of release bearing date, &c. and made, &c. purporting to be, and being an indenture of settlement made in contemplation of a marriage, then intended and since solemnized between the said (*husband*) and (*wife*), there is contained a proviso authorising the said (*trustees*) at any time after the said marriage, upon the request in writing of the said (*husband*), to lend him, out of the trust monies and securities therein mentioned, any sum of money not exceeding the sum of 1000*l.* sterling, on his executing a bond or obligation in writing, and a mortgage of lands and hereditaments in England, to which he can deduce an indefeasible title, for repayment of the same with interest. AND WHEREAS the said (*trustees*) in pursuance of the authority given to them by the said in part recited indenture, have, at the request of the said (*husband*) this day lent unto him the sum of 1000*l.* sterling out of the trust monies in their hands, and the said (*husband*) hath entered into a bond for payment thereof, as required by the said power or authority, and hath agreed to execute these presents, being or intending to be a mortgage of certain lands and hereditaments situate at Swindon aforesaid, in the said county of Wilts, to which a satisfactory title hath been deduced.

17. That Money is advanced by Trustees on a Joint Account.

AND WHEREAS the said sum of 8000*l.* advanced to the said (*mortgagor*) as aforesaid, was advanced by the said (*mortgagees*) out of money belonging to them jointly: And it is understood and agreed that the said sum of 8000*l.* and the interest thereof, or so much of the same respectively as shall remain unpaid at the death of either of them, the said (*mortgagees*) shall be payable and paid to the survivor of them, or the executors or administrators of such survivor.

18. Mortgage Bond.

AND WHEREAS the said (*mortgagor*) hath, in pursuance of the said agreement, by his bond or obligation in writing, bearing even date with these presents, become bound unto the said (*mortgagee*) in the penal sum of 1000*l.*, with a condition thereunder written, for making void the same, on payment by the said (*mortgagor*), his heirs, executors, or administrators, unto the said (*mortgagee*) his executors, administrators, and assigns, of the sum of 500*l.* and interest, after the rate and in manner therein mentioned.

19. Warrant of Attorney.

AND WHEREAS the said (*mortgagee*) hath, in further pursuance of the said agreement, executed a warrant of attorney, bearing even date with the said bond and these presents, thereby authorising certain attorneys of his majesty's court of Common Pleas at Westminster, to enter up judgment by default in an action of debt in the said bond, for the said sum of 1000*l.* and costs of suit.

20. Deed creating Power of Appointment.

WHEREAS by indentures of lease and release, bearing date respectively on or about the 10th and 11th days of August, in the year 1810, the indenture of release being of six parts, and made or expressed to be made between A. B. of the first part, several other persons of the second, third, and fourth parts, the said (*mortgagor*) of the fifth part, and the (*trustee*) of the sixth part, all and singular the lands and hereditaments hereinafter particularly mentioned and described, and also appointed and demised, or otherwise assured or intended so to be, were or were expressed or intended to be conveyed and assured by the said (*releasor*) unto the said (*mortgagor*) and his heirs, to the use of such person or persons for such estate or estates, with, under, and subject to such powers, provisos, and declarations as the said (*mortgagor*), by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by him, and attested by two or more credible witnesses [omit wills, adding "or otherwise, as in the said indenture of release now in recital is expressed"] should from time to time direct, limit, or appoint; and in default of any and subject to every such appointment, To the use of the said (*mortgagor*) and his assigns for his life, with remainder, To the use of the said (*trustee*) and his heirs, during the life of the said (*mortgagor*), in trust for the said (*mortgagor*) and his assigns, with remainder to the use of the said (*mortgagor*), his heirs and assigns for ever.

21. *Mortgage in Fee.*

WHEREAS by indentures of lease and release, bearing date respectively on or about the 4th and 5th days of May, in the year 1819, and made or expressed to be made between the said (mortgagor) of the one part, and the said (mortgagee) of the other part; it is by the indenture of release witnessed, that in consideration of the sum of 800*l.* paid by the said (mortgagee) to the said (mortgagor), the said (mortgagor) did grant, bargain, sell, alien, release, and confirm the messuages or tenements and hereditaments hereinafter described, and also released or otherwise assented, or intended so to be, unto the said (mortgagee), his heirs and assigns, TO HOLD the same, with the appurtenances, unto the said (mortgagee), his heirs and assigns, subject, nevertheless, to a proviso or agreement for redemption* on payment by the said (mortgagor), his heirs, executors, or administrators, unto the said (mortgagee), his executors, administrators, and assigns, of the sum of 800*l.* and interest, after the rate, on the day, and time and in manner, in the now reciting indenture limited and appointed for payment thereof, and being a day and time which is [long] since past.

22. *Default in Payment.*

AND WHEREAS default was made in payment to the said (mortgagee) of the said sum of 500*l.* and interest, at the day and time, and in manner by the said lastly hereinbefore in part recited indenture of mortgage limited and appointed for payment thereof; and by reason of such default, the estate and interest of the said (mortgagee) of and in the said messuage or tenement and hereditaments became absolute at law, subject, nevertheless, to redemption in equity.

23. *Mortgage by Demise.*

WHEREAS by indenture, bearing date on or about the 4th day of October, in the year 1807, and made or expressed to be made between the said (mortgagor) of the one part, and the said (mortgagee) of the other part, it was witnessed, that in consideration of the sum of 900*l.* to the said (mortgagor), paid by the said (mortgagee), the said (mortgagor) did grant, bargain, sell, and demise unto the said (mortgagee) his executors, administrators, and assigns, ALL THAT (describe parcels at length, with general words.) TO HOLD the same, with the appurtenances unto the said (mortgagee), his executors, administrators and assigns, from the day next before the day of the date of the now reciting indenture, for the term of 500 years, thence next ensuing, at the rent of a pepper corn, if demanded, subject, nevertheless, to a proviso or agreement for redemption, on payment by the said (mortgagor), his heirs, executors, or administrators, unto the said (mortgagee), his executors, administrators, and assigns, of the sum of 900*l.* and interest, after the rate, on the day and time, and in manner in the now reciting indenture limited and appointed for payment thereof, as, by reference thereto, will more fully and at large appear.

24. *Mortgage of Leaseholds.*

AND WHEREAS by an indenture of assignment by way of mortgage, bearing date, &c. and made, &c. the said (mortgagor), in consideration of the sum of 500*l.* then advanced to him by the said (mortgagee) by way of loan, granted and assigned unto the said (mortgagee), his executors, administrators, and assigns, the several messuages or tenements and premises therein, and hereinbefore particularly described, for the residue then to come and unexpired of a term of 999 years, under or by virtue of a lease, bearing date the 1st day of May, 1812, and made or expressed to be made between (the lessor) of the one part, and (the lessee) of the other part, but subject, nevertheless, to a proviso in the said indenture of assignment contained, that if the said (mortgagor), his heirs, executors, or administrators, should pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, the sum of 500*l.* and interest, on the 4th day of August next ensuing the date thereof, then the said indenture should cease and be void.

25. *Mortgage of Copyholds.*

AND WHEREAS by a surrender duly made of the said lands and hereditaments, at a court holden for the said manor on the 5th day of January, 1805, in pursuance of an indenture bearing date the 10th day of October preceding, and made between, &c. the same were surrendered into the hands of the lord of the said manor, to the use of the said (mortgagee) and his heirs, subject to a condition therein contained, for making void the same indenture and surrender on payment of the sum of 700*l.* and interest, on a day therein mentioned and now past.

26. *Further Charge.*

AND WHEREAS by an indenture, bearing date, &c. and made, &c. after reciting that the said (mortgagor) had occasion for the further sum of 500*l.*, and that the said (mortgagee) had agreed to advance the same, it was witnessed, that in consideration of the sum of 500*l.* to the said (mortgagor) paid by the said (mortgagee), the said (mortgagor), for himself, his heirs, executors, and administrators, did covenant and declare to and with the said (mortgagee), his

* "In the words following, that is to say," Then set out the proviso fully, if it be for the re-transfer of public stock.

executors, administrators, and assigns, that the hereditaments comprised in the said recited indenture of mortgage, should stand charged with the further sum of 500*l.* and interest, and should not be redeemed or redeemable until as well the said sum of 1000*l.* and interest, as also the said sum of 500*l.* then lent, and the interest thereof, should be fully paid, satisfied, and discharged.

27. Two Indentures of further Charge.

AND WHEREAS by two several indentures of further charge, bearing date respectively the 26th day of May, 1814, and the 3d day of June, 1816, and respectively made or expressed to be made between the said (*mortgagor*) of the one part, and the said (*mortgagee*) of the other part, the said messuages or tenements and hereditaments, became charged with the further sums of 200*l.* and 500*l.* payable to the said (*mortgagee*), his executors, administrators, and assigns, as by reference to the said indentures respectively, will more fully and at large appear.

28. Transfer of Mortgage.

AND WHEREAS by indentures of lease and release, bearing date respectively on or about the 4th and 5th days of April in the year 1820, and made or expressed to be made between the said (*mortgagee*) of the one part, and the said (*transferee*) of the other part, the said (*mortgagee*) in consideration of the sum of 900*l.* paid to him by the said (*transferee*), conveyed and assured all and singular the said messuages or tenements and hereditaments comprised in the said recited indenture of mortgage, unto and to the use of the said (*transferee*), his heirs and assigns for ever, subject nevertheless to such equity or right of redemption as the same hereditaments were subject and liable to, under or by virtue of the said hereinbefore in part recited indenture of mortgage, and of the proviso, condition, or agreement for that purpose, in the same indenture contained.

29. Policy of Insurance.

AND WHEREAS by a deed poll or policy of insurance, under the hand and seals of A. B., C. D., and E. F., three of the directors of the London Insurance Office for the insurance of lives and survivorships, bearing date on or about the 4th day of this instant, May, and numbered 2768, the sum of 1800*l.* was assured to be paid to the executors, administrators, or assigns of the said (*mortgagor*), within three months after his decease, in consideration of the annual premium of 25*l.* 3*s.* 4*d.* to be paid on the 17th day of May in each and every year.

30. College Lease, and Licence to assign.

AND WHEREAS by an indenture of lease, bearing date on or about the 10th day of June, in the year 1822, and made or expressed to be made between the right worshipful F. R. doctor in divinity, Dean of the cathedral church of the Holy Trinity of Winchester, in the county of Southampton, and the Chapter of the same church of the one part, and the said (*mortgagor*) of the other part, the said dean and chapter, in consideration of the surrender of a former lease and for other considerations in the now reciting indenture mentioned, did demise, grant, and to farm let, unto the said (*mortgagor*) all that their farm, &c. [*describe parcels verbatim, with exceptions and general words*]. To HOLD the same messuage or tenement and premises with the appurtenances (*except as aforesaid*) unto the said (*mortgagor*) his executors, administrators, and assigns, from the feast day of the annunciation of the Blessed Virgin Mary, then last past, for the term of 21 years thence next ensuing, at and under the yearly rent of 4*l.* 4*s.* payable half-yearly, and subject to the observance and performance of the covenants, conditions, and agreements in the now reciting indenture contained, and which, on the tenant's or lessee's part and behalf, are or ought to be observed, done, performed, fulfilled, and kept. AND WHEREAS the said (*assignor*) hath obtained a full licence and authority, in writing under the hand of the said (*lessor*), bearing date the 2d day of July last past, enabling him to assign the said messuages or tenements and premises in the manner hereinafter expressed, a copy of which said licence is, or is intended to be indorsed on these presents.

31. Mortgagee's Will devising legal Estate to Trustees.

AND WHEREAS the said (*mortgagee*) made and published his last will and testament in writing, bearing date on or about the 8th day of August, in the year 1820, and executed and attested in such manner as the law prescribes for rendering valid devises of estates of inheritance, and thereby gave and devised unto the said (*trustees*), their heirs and assigns, all such real estates as were then vested in him by way of mortgage, in order to enable them, with the greater ease and convenience, to recover, receive, and get in the money secured by such mortgages for the purposes of his said will, and appointed the said A. B. and C. D. executors.

32. Death of Testator and Probate of his Will.

AND WHEREAS the said (*mortgagee*) departed this life on or about the 10th day of December, in the year 1821, without having altered or in anywise revoked his said hereinbefore in part recited last will and testament, and the said A. B. alone (the said C. D. having renounced the probate of the said will) on or about the 25th day of April now last past, duly proved the said last will and testament in the prerogative court of the archbishop of Canterbury [or, in the

archdeaconry court of Berks,] and obtained letters of probate of the same last will and testament, and the administration of all and singular the goods, chattels, and credits of the said (*mortgagee*).

33. *Devisee entitled to Mortgage.*

AND the said (*devisee*) by means of the said will or otherwise, became seised of the legal estate of all the lands and hereditaments which were respectively demised and released, or otherwise assured, and also entitled to the principal money and interest secured, by the said hereinbefore in part recited securities and further charges respectively.

34. *Mortgagee's Death and Appointment of Executors.*

AND WHEREAS the said (*mortgagee*) departed this life in or about the month of July last, having first duly made and published his last will and testament in writing, bearing date on or about the 6th day of June preceding, and thereof appointed the said A. B. and C. D. executors, who on or about the 5th day of August now last, duly proved the same will in the pre-rogative court of the archbishop of Canterbury, and took upon themselves the burthen of the execution thereof.

35. *That Mortgagee died intestate.*

AND WHEREAS the said (*mortgagee*) departed this life in or about the month of June, 1802, intestate, and the said (*administrator*) hath obtained letters of administration of all and singular the goods, chattels, and credits of the said (*mortgagee*) from the consistory court of the bishop of Winchester, bearing date the 5th day of July in the present year.

36. *Money due.*

AND WHEREAS there is now due and owing to the said (*mortgagee*) the sum of 525*l.* for principal and interest, on the said recited security, as he the said (*mortgagor*) doth hereby admit and acknowledge, testified by his execution of these presents.

37. *Principal due, Interest paid.*

AND WHEREAS the said principal sum of 550*l.* still remains due and owing unto the said J. B. upon the said lastly hereinbefore in part recited security, but all interest for the same hath been paid and satisfied, up to the day of the date of these presents, as he the said (*mortgagee*) doth hereby admit and acknowledge, testified by his execution of these presents.

38. *Account stated.*

AND WHEREAS an account hath this day been made up between the said (*mortgagee*) and (*mortgagor*) and there appears to be due to the said (*mortgagee*) in respect of the said mortgage, the sum of 840*l.* for principal and interest up to the day of the date of these presents, as he the said (*mortgagee*) doth acknowledge, testify, and declare.

39. *Dividends due.*

AND WHEREAS there is now due on the lastly hereinbefore in part recited indentures, the sum of 51*l.*, as and for dividends on the said sum of 1700*l.*, 3 per cent. consolidated bank annuities, so transferred as aforesaid.

40. *Money due from Mortgagor to Executors of Mortgagee.*

AND WHEREAS the said principal sum of 600*l.*, as also the sum of 30*l.*, for an arrear of interest thereon, making together the sum of 630*l.*, are now due and owing from the said (*mortgagor*) to the said A. B. and C. D., as the executors of the said (*mortgagee*) upon or by virtue of the said hereinbefore in part recited indenture of mortgage made to the said (*mortgagee*) as aforesaid, as the said several persons parties hereto, as far as they respectively are interested in or entitled to the same, do hereby admit and acknowledge, testified by their respective executions of these presents.

41. *Purchase Money insufficient to satisfy Mortgage Money.*

AND WHEREAS the said sum of 300*l.* is insufficient to pay off and discharge the said sum of 5000*l.* so due and owing on the said recited security as aforesaid; but the said (*mortgagee*) hath agreed to accept the sum of 2000*l.*, part of the said purchase money, or sum of 3000*l.* in full for all his right and title in and to the said hereditaments so purchased by the said A. B. as aforesaid.

42. *That Mortgage Money exceeds Purchase Money where Part of Premises are sold.*

AND WHEREAS the money due for principal and interest on the said in part recited mortgages and securities to the said (*mortgagee*), exceeds the said purchase money or sum of 630*l.*; wherefore it hath been agreed, that the whole of the same purchase money shall be paid by the said (*purchaser*) to the said mortgagee, in part satisfaction and discharge of so much of the said principal money and interest; and the said (*mortgagee*) being well satisfied that the other hereditaments comprised in the said recited indentures, are a full and ample security for the residue of the said principal money and interest, hath agreed that the messuages and premises so sold

to the said (*purchaser*) as aforesaid, and intended to be hereby conveyed, shall be exonerated and discharged of and from all such principal money and interest on the said purchase money of 630*l.*, being paid to him in manner hereafter mentioned; and the said I. C., J. B., and C. B., according to their respective estates and interests in the premises, have consented and agreed to join in the conveyance thereof intended to be made by these presents.

43. *Agreement to exonerate Part of Lands.*

AND WHEREAS the said (*mortgagee*) is satisfied that the other hereditaments comprised in the said term of 500 years are an ample security for the said sum of 2000*l.*; and it hath been agreed by and between the said (*mortgagee*) and (*purchaser*), that the said term of 500 years, so far as it respects the message or tenement and premises, covenanted and agreed to be purchased by the said (*purchaser*), shall be surrendered to him; to the intent that the now residue of the same term may be merged and extinguished, and that the lastly mentioned premises may be discharged of and from the said principal sum of 2000*l.* and interest.

44. *Agreement in transfer of Mortgage.*

AND WHEREAS the said (*mortgagee*) hath contracted with the said (*assignee*) to assign and make over to him the said debt or principal sum of 800*l.*, so due and owing upon the said in part recited security, together with all arrears of interest due for the same, and all his estate, right, interest, and lien, in and upon the several messuages, lands, tenements, and hereditaments, comprised in the said indenture of mortgage, at or for the price or sum of 840*l.*

45. *Agreement for Loan in transfer of Mortgage when a further Sum is advanced.*

AND WHEREAS the said (*mortgagee*) having occasion for the said sum of 600*l.*, hath requested the said (*mortgagor*) to pay off and discharge the same, but it not being convenient for the said (*mortgagor*) at present so to do, he hath requested the said (*new lender*) to pay off and discharge the same, and also to advance and lend him the further sum of 200*l.* at interest, which the said (*new lender*) hath consented and agreed to do, on having the re-payment of the same sums respectively, and their interests, secured to him in manner hereinafter mentioned.

46. *Another Form.*

AND WHEREAS the said J. W. hath agreed to advance and lend to the said W. B. and M. his wife, the sum of 550*l.*, to be applied in paying off and discharging the said sum of 550*l.* so due and owing to the said J. S. as aforesaid, and also to advance and lend unto the said W. B. and M. his wife the further sum of 800*l.*, making together the sum of 1350*l.*, to be applied and disposed of in manner hereinafter mentioned.

47. *Mortgagee's Executors call in Money and Legatee agrees to join.*

AND WHEREAS the said (*mortgagee's executors*) having occasion for the said sum of 100*l.* to answer the trusts and purposes of the said recited will of the said (*mortgagee*), have called in the same, which it not being convenient for the said (*mortgagor*) at present to pay, he hath applied to and requested the said (*transferee*) to pay off and advance the same for him, which the said (*transferee*) hath consented and agreed to do, on having the said message and premises comprised in the said recited security assigned and assured to him in manner hereinafter mentioned: And the said (*legatee*) on the application of the said (*executors*), and in order to give effect to the assignment intended to be hereby made, as far as he hath any interest in the premises, hath agreed to join in the same assignment.

48. *That Mortgagor is desirous of discharging Mortgage.*

AND WHEREAS the said (*mortgagor*) hath proposed and agreed to pay off and discharge the said sum of 1000*l.*, so due and owing by him to the said (*mortgagee*) as aforesaid, which the said (*mortgagee*) hath agreed to accept, and the said (*mortgagor*) hath requested the said (*mortgagee*) to re-convey and re-assure the said message, &c. unto him the said (*mortgagor*), to the uses, upon the trusts, and for the ends intents and purposes hereinafter mentioned.

49. *That Money has been paid.*

AND WHEREAS the said principal sum of 1000*l.*, and all interest in respect thereof, have been paid, satisfied, and discharged, as the said (*mortgagee*) do hereby admit and acknowledge, testified by their severally executing these presents.

50. *Another Form.*

AND WHEREAS the said sum of —*l.*, and all interest due in respect thereof, have been fully paid and satisfied previously to the sealing of these presents, but no re-conveyance hath yet been executed by the said (*mortgagee*) of the said premises.

51. *Money paid—no Representation, and limited Administration granted.*

AND WHEREAS the said sum of 1000*l.*, together with all interest thereon, hath long since

been paid satisfied and discharged, but no assignment or other assurance of the said term of 500 years hath ever been made or executed by the said (*mortgagee*) in his life-time, or by any other person on his behalf since his decease, and there is not at this time any legal representative of the said (*mortgagee*) to be found, and the freehold and inheritance of all and singular the before mentioned hereditaments, is now vested in the said (*purchaser*). AND WHEREAS letters of administration of all and singular the goods, chattels, and credits of the said (*mortgagee*) deceased, so far only as relates to the residue of the said term of 500 years, of and in the said hereditaments, have been granted and committed to the said A. B. by the consistory court of the Bishop of Norwich, for the purpose of assigning the said term of 500 years of and in the said premises, in manner hereinafter mentioned.

52. *Part of Mortgage Money paid in.*

AND WHEREAS the sum of 1000*l.* was, in or about the month of November, paid by the said (*mortgagor*) to the said (*mortgagee*) in part payment and discharge of said principal sum of 3000*l.*, and the principal due on the said mortgage was by that payment reduced to 2000*l.*

53. *Mortgage Money to be paid out of Purchase Money.*

AND WHEREAS the said (*mortgagor*) hath contracted and agreed with (*purchaser*), of, &c. for the absolute sale to him of the said messuages or tenements and hereditaments, comprised in the said recited indenture of mortgage, at or for the price or sum of 1500*l.*, out of which it hath been agreed that the said sum of 1000*l.* so due and owing by the said (*mortgagor*) to the said (*mortgagee*) as aforesaid shall be paid, which the said (*mortgagee*) hath agreed to accept, and to convey the said hereditaments unto him the said (*purchaser*), his heirs and assigns, to the uses upon the trusts, and for the ends intents and purposes hereafter limited expressed and declared of and concerning the same.

54. *Agreement of Mortgagee's Heir to re-convey.*

AND WHEREAS the said (*heir*) is the eldest son and heir at law of the said (*mortgagee*). AND WHEREAS the said (*heir*), on the joint application of the said (*mortgagor*) and the said (*executors*), hath agreed to re-convey and re-assure the said messuages or tenements and hereditaments, unto and to the use of the said (*mortgagor*), his heirs and assigns [or, unto the said (*mortgagor*), his heirs and assigns, to the uses upon the trusts, and for the ends intents and purposes hereinafter limited expressed and declared of and concerning the same.]

55. *To obviate doubts, both Devisee and Heir of Mortgagee have agreed to join in Re-conveyance.*

AND WHEREAS the said hereinbefore in part recited will was duly executed and attested for the devise of estates of inheritance, but it is doubtful whether the messuages or tenements and hereditaments comprised in the said recited indenture of mortgage, passed thereby to the said E. F. the general devisee therein named, or whether the same hereditaments descended to the said G. H., as the eldest son and heir at law of the said (*mortgagee*); to obviate which doubt, the said E. F. and G. H. have both consented and agreed to join in the conveyance and assurance hereinafter contained.

56. *Order that Infant Mortgagee shall re-convey.*

AND WHEREAS by an order of the High Court of Chancery, bearing date the 10th day of May now last past, made in the matter of the said (*infant heir*) an infant, on the petition of the said (*mortgagor*), in pursuance of an act passed in the seventh year of the reign of queen Anne, intituled, "An act to enable infants who are seised or possessed of estates in fee, in trust, or by way of mortgage, to make conveyances of such estates;" after reciting that Master Stephen, the Master to whom the said matter stood referred, had, by his report, bearing date the 30th day of December then last past, found that the said (*infant heir*) was an infant mortgagee, in trust for the representatives of the said (*mortgagee*) deceased, until payment of the said sum of 1000*l.* and interest, and other charges upon the said premises, IT WAS ORDERED, that the said Master's report should be confirmed, and that the said (*infant heir*), the infant, should release and convey the hereditaments and premises in the said report mentioned (being the hereditaments hereinafter released or otherwise assured or intended so to be), pursuant to the said act of parliament and according to the report of the said Master. AND WHEREAS the said Master hath perused and approved of these presents engrossed on two skins of parchment, and also of an indenture of bargain and sale for a year hereinafter referred to, engrossed upon one skin of parchment, and in testimony of his approbation of the same respectively, hath set his name in the margin of each of the skins of these presents, and also in the margin of the said indenture of bargain and sale.

57. *Bill of Foreclosure.*

AND WHEREAS the said (*mortgagee*) did, in Hilary Term, in the third year of the reign of his present Majesty, exhibit his bill in his Majesty's High Court of Chancery against the said (*mortgagor*), in order to be paid the principal and interest due on his said mortgage, or in default

thereof that the said (*mortgagor*) might stand absolutely foreclosed of and from all equity and right of redemption of and in the said mortgaged premises. AND WHEREAS by a decree or decretal order of the said court, bearing date on or about the 10th day of March, and made in the same cause, IT WAS ORDERED AND DECREED that the said (*mortgagor*), his executors, administrators, and assigns, should stand absolutely debarred and foreclosed of and from all equity and right of redemption whatsoever of, in, or to the said mortgaged premises.

58. *Agreement for Sale with Power for Vendor to re-purchase within a Year.*

AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the sale to him of the manors, messuages, or tenements, and hereditaments, hereinafter described, and also released or otherwise assured or intended so to be, and of the fee-simple and inheritance thereof, free from all incumbrances, at or for the price or sum of 5000*l.*, subject nevertheless to a right in the said A. B. or his heirs, to re-purchase the same manors, messuages, or tenements and hereditaments, at any time within one year from the day of the date of these presents, upon the terms expressed in the agreement hereinafter in that behalf contained.

59. *Deposit of Deeds.*

AND WHEREAS upon the execution of the said in part recited indenture, the several deeds and evidences of title relating to the said hereditaments mentioned and set forth in the schedule hereunder written, were delivered to the said (*mortgagee*) in pledge, for the said sum of 500*l.* and interest. AND WHEREAS the said (*mortgagee*), at the request of the said (*mortgagor*), hath agreed to enter into such covenant for re-delivering the same deeds and evidences unto the said (*mortgagor*), his heirs and assigns, upon re-payment of the said sum of 500*l.* and interest, and for producing them in the mean time, as hereinafter is contained.

60. *Term to secure Mortgage Money and then to attend.**

AND WHEREAS upon the treaty for the loan of the said sum of 500*l.* it was agreed that the said two several terms of 1000 years and 1000 years of and in the said closes of land and hereditaments, should be assigned to separate trustees of the nomination of the said (*mortgagee*), upon trust in the first place for better securing to the said (*mortgagee*), his executors, administrators, and assigns, the re-payment of the said sum of 500*l.* and interest, and subject thereto, in trust for the said (*mortgagor*), his heirs and assigns, and to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same premises, in manner hereinafter mentioned.

CONSIDERATIONS AND GENERAL WORDS.

61. *Nominal Consideration.*

In consideration of 10*s.* of good and lawful money current in England, to the said A. B., paid by the said C. D., at or immediately before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged.

62. *Money Consideration from Mortgagee to Mortgagor.*

In consideration of the sum of 500*l.* of good and lawful money current in England, to the said (*mortgagor*), in hand well and truly paid by the said (*mortgagee*), at or immediately before the sealing and delivery of these presents, the receipt of which said sum of 500*l.* he the said (*mortgagor*) doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said (*mortgagee*), his heirs, executors, administrators, and assigns, and every of them for ever, by these presents.

63. *Another Form, where there is no Recital of the Mortgagor's Occasion to borrow.*

In consideration of the sum of 5000*l.*, of good and lawful money current in England, to the said (*mortgagor*), this day lent, advanced, and paid by the said (*mortgagee*), the receipt whereof the said (*mortgagor*) doth hereby admit and acknowledge, and of and from the same and every part thereof, doth acquit, release, and discharge the said (*mortgagee*), his heirs, executors, administrators, and assigns, and every of them for ever, by these presents.

64. *Consideration in transfer of Mortgage, with transfer of Mortgage by Demise and Parcels.*

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for and in consideration of the sum of 500*l.* of good and lawful money current in England, to the said (*mortgagee*), in hand well and truly paid by the said (*transferee*), at or immediately before the sealing and delivery of these presents (at the request and by the direction and appointment of the said (*mortgagor*), testified by his being made a party to, and sealing and delivering these presents); the receipt of which said sum of 500*l.*, and that the same is in full satisfaction and discharge of all principal monies and interest, and all other sum and sums of money whatsoever due and owing to him the said (*mortgagee*), on or by virtue of the said hereinbefore in part

* For corresponding trusts, see No. xzii, *infra*.

recited indentures of mortgage, further charge, and assignment, or any or either of them respectively, he the said (*mortgagee*) doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, exonerate, and discharge the said (*transferee*), and also the said (*mortgagor*), their respective heirs, executors, administrators, and assigns, and every of them, and also the said hereditaments charged with the payment thereof, for ever by these presents: AND ALSO, in consideration of the further sum of 300*l.* of like lawful money as aforesaid to the said (*mortgagor*), in hand, at the same time well and truly paid by the said (*transferee*), the receipt and payment of which said several sums of 300*l.* and 500*l.*, making together the sum of 800*l.*, he the said (*mortgagor*) doth hereby admit and acknowledge, and of and from the same and every part thereof respectively doth acquit, release, and discharge the said (*transferee*), his heirs, executors, administrators, and assigns, and every of them for ever by these presents: He the said (*mortgagee*), at the request and by the direction and appointment of the said (*mortgagor*), testified as aforesaid, and by way of assignment or other assurance only, and not of covenant or warranty, hath bargained, sold, assigned, transferred, and set over; and by these presents BOTH bargain, sell, assign, transfer, and set over; and the said (*mortgagor*) hath granted, bargained, sold, assigned, ratified, and confirmed; and by these presents BOTH grant, bargain, sell, assign, ratify, and confirm unto the said (*transferee*), his executors, administrators, and assigns, ALL THOSE the aforesaid messuages or tenements, gardens, hereditaments, and all and singular other the premises hereinbefore particularly mentioned and described, and which by the hereinbefore in part recited indenture of mortgage, bearing date on or about the 10th day of February, 1821, were granted and demised to the said (*mortgagee*), his executors, administrators, and assigns as aforesaid, and by the said lastly hereinbefore in part recited indenture, bearing date on or about the 8th day of June, 1822, were assigned to the said (*mortgagee*) as aforesaid; And all the estate, &c.

65. *Consideration in Re-conveyance, or Conveyance of Equity of Redemption.*

In consideration of the sum of 800*l.* of good and lawful money current in England, to the said (*mortgagee*), paid by the said (*mortgagor*) before the sealing and delivery of these presents, the receipt whereof [and that the same is in full payment and satisfaction of all principal and interest monies due upon or in respect of the said hereinbefore in part recited mortgage security] [or, and that the same is in full for the purchase of all right, power, and equity of redemption, which he the said (*mortgagor*) now hath, or can or may claim, of, in, to, out of, or upon the said hereditaments, hereby released or otherwise assured or intended so to be], the said (*mortgagee*) doth hereby acknowledge, and of and from the same and every part thereof, doth fully and absolutely acquit, release, exonerate, and for ever discharge the said (*mortgagor*), his heirs, executors, and administrators, and also the said mortgaged premises, as well by these presents as by the receipt or acknowledgment for the same sum hereupon indorsed or intended so to be.

66. *Consideration paid—Part by Purchaser and Part by Mortgagee.*

In consideration of the sum of 5000*l.* of good and lawful money, current in England, to the said (*vendor*), well and truly paid by the said (*mortgagee*) and (*purchaser*), at or immediately before the sealing and delivery of these presents, in the proportions following, that is to say, the sum of 3000*l.* by the said (*mortgagee*), and the sum of 2000*l.* by the said (*purchaser*), the receipt of which said sum of 5000*l.*, and that the same is in full for the absolute purchase of the messuages or tenements lands and hereditaments hereafter described, and also released or otherwise assured or intended so to be, and the fee-simple and inheritance thereof, free from all incumbrances, except as hereinafter is excepted, he the said (*vendor*) doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, exonerate, and for ever discharge the said (*mortgagee*) and (*purchaser*) respectively, and their respective heirs, executors, administrators, and assigns, and every of them for ever by these presents.

67. *Consideration paid by Purchaser of part of premises to Mortgagee.*

In consideration of the sum of 400*l.* to the said (*mortgagee*), well and truly paid by the said (*purchaser*), immediately before the execution of these presents, (on the nomination and at the instance and request of the said (*mortgagor*), testified by his executing these presents) and in part of the principal monies and interest due and owing to him the said (*mortgagee*), on the security of the said several mortgages made to him as aforesaid, and in full for the absolute purchase of the fee-simple and inheritance of and in the messuages or tenements and hereditaments hereinafter released and covenanted to be surrendered or otherwise assured or intended so to be, discharged of and from the payment of all or any part of the residue of the said sum of 1400*l.*, or any contribution for or in respect or on account of the same.

68. *Lease for a Year.*

(In his actual possession now being, in virtue of a bargain and sale to him thereof made by the said (*mortgagor*), in consideration of 5*s.* to him paid by the said (*mortgagee*), by indenture bearing date the day next before the day of the date of these presents for one whole year, to commence from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession); and to his heirs and assigns, ALL THAT, &c.

69. *Sweeping Clause.*

OR howsoever otherwise the same message or tenement lands and hereditaments, now are or is, or heretofore were or was tenanted, called, known, or described, situate, lying, and being, abutted, bounded, parted, divided, altered, or distinguished, and all and singular other the messages, tenements, lands, and hereditaments, of him the said (*mortgagor*), situate, lying, and being in B. aforesaid, or elsewhere in the said county of Berks.

70. *General Words—Farms.*

TOGETHER with all and singular houses, out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, paths, passages, waters, water-courses, timber, and other trees, woods, underwoods, and the ground and soil thereof, commons, common of pasture and of turbary, and other commonable rights, hedges, ditches, fences, mounds, liberties, privileges, profits, commodities, advantages, and appurtenances whatsoever, to the said message or tenement close of land and hereditaments hereby released or otherwise assured or intended so to be, or to any of them, or to any part thereof respectively, belonging or in anywise appertaining, or to or with the same, or any part thereof, now or at any time heretofore usually had, held, used, occupied, possessed, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any of them respectively.

71. *Houses only.*

AND all houses, out-houses, edifices, buildings, cellars, cellars, vaults, areas, courts, court-yards, wood-houses, pumps, cisterns, privies, sewers, gutters, wydraughts, backsides, gardens, [tan and other pits], ways, paths, passages, lights, waters, water-courses, liberties, privileges, easements, profits, commons, commodities, advantages, and emoluments whatsoever, to the message or tenement and premises hereby released, or otherwise assured or intended so to be, or any of them respectively, belonging or in anywise appertaining, or accepted, reputed, deemed, taken, known, held, used, occupied, or enjoyed as part, parcel, or member of the same, or any of them respectively.

72. *Reversion.*

AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said message or tenement and hereditaments hereby released or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances.

73. *Estate.*

AND all the estate, right, title, interest, use, trust, inheritance, term and terms for years, and for life or lives, [tenant right and right of renewal,] property, possession, benefit and equity of redemption, claim and demand, whatsoever, both at law and in equity, or otherwise howsoever of him the said (*mortgagor*), of, in, to, out of, or upon the said messages or tenements and hereditaments hereby released or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances.

74. *All the Right, &c. with short Power of Attorney.*

AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity or otherwise howsoever, of them the said A. B., and C., his wife, or either of them, of, in, to, out of, or upon the said messages and premises hereby assigned or intended so to be, or any part thereof respectively, WITH FULL power and authority to and for the said (*mortgagee*), his executors, administrators, and assigns, to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for the said principal monies, interest, and premises hereby assigned or intended so to be, and every or any part thereof respectively, either in his or their now name or names, or in the names or name of the said A. B., and C. his wife, or either of them.

75. *Deeds.*

AND ALL DEEDS, evidences, and writings whatsoever, relating to, or in anywise concerning the said messages or tenements and hereditaments, now in the custody, possession, or power of the said (*mortgagor*), or which he can or may procure or obtain without suit at law or in equity.

POWERS AND PROVISORS.

76. *Power of Attorney.*

AND for the better and more effectually enabling the said (*assignee*), his executors, administrators, and assigns, to receive and get in the said principal sum of 1700*l.* and interest hereby assigned, or intended so to be, the said (*mortgagee*) hath made, ordained, constituted, and appointed and by these presents hath made, ordain, constitute, and appoint the said (*assignee*), his executors, administrators, and assigns, to be the true and lawful attorney and attorneys of him the said (*mortgagee*), his executors and administrators, and in the name of him the said

(mortgagee), his executors and administrators, or in the name of the said (assignee), his executors or administrators, to ask, demand, sue for, recover, and receive, of and from the said (mortgagor), his heirs, executors, or administrators, or any or either of them, or whom else it may concern, the said principal sum of 1700*l.* and interest, and the full benefit of the said recited indentures of mortgage and further charge; and to make, sign, seal, execute, and deliver a good and sufficient receipt, release, acquittance, or other discharge or discharges for the same principal sum and interest, either for the whole or any part thereof; and generally to make, do, and execute, or cause or procure to be made, done, and executed, any other act, deed, matter, or thing whatsoever, for the purpose of obtaining, recovering, and receiving the said principal sum of 1700*l.* and interest; and one or more attorney or attorneys for all or any of the purposes aforesaid, in the name and as the act and deed of him the said (mortgagee), his executors or administrators, to make, nominate, depute and appoint, and at will and pleasure to revoke; and notwithstanding any such substitution, deputation, or appointment of any other attorney or attorneys under him or them, the said (assignee), his heirs, executors, administrators, or assigns, to exercise and perform all or any of the powers and authorities hereinbefore expressed, and reserved and given to him and them; and the said (mortgagee) doth hereby give and grant unto the said (assignee), his executors, administrators, and assigns, and to his and their substitute and substitutes, the full and whole powers and authorities of him the said (mortgagee) over the premises; and doth hereby undertake to ratify, confirm, and allow to be valid and sufficiently available and effectual to all intents and purposes whatsoever, all and whatsoever the said (assignee), his executors, administrators, and assigns, or his or their substitute or substitutes, shall lawfully do or cause to be done in and about the premises by virtue of these presents.

77. *Proviso for Redemption.*

PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the said parties hereto, and the true intent and meaning of them and of these presents are and is, that if the said (mortgagor), his heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, at or in his now dwelling-house, situate at Lechlade aforesaid, the full sum of 800*l.* of lawful money current in England, with interest for the same at and after the rate of 5*l.* for every 100*l.* by the year, upon the 8th day of June, [six months from date of the deed] now next ensuing, without any deduction or abatement whatsoever; then the said term of 500 years hereby created, and these presents, and every article, clause, matter, and thing herein contained, shall cease, determine, and be void to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

78. *Proviso for Redemption from two Mortgagors to two Mortgagees, in a Mortgage by Demise ceasing the Term, and also a Bond on payment of the Money.*

PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the said parties to these presents, as far as they respectively are interested, and the true intent and meaning of them and of these presents are and is, that if the said (mortgagors) or either of them, their or either of their heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the said (mortgagees), or the survivor of them, their heirs, executors, administrators, or assigns, the full sum of 1050*l.* of lawful money current in England, at or in the Common Dining Hall of the Inner Temple, London, in manner following, that is to say, the sum of 25*l.* being half a year's interest on the said sum of 1000*l.*, after the rate of 5*l.* for every 100*l.* by the year, on the 8th day of November now next ensuing; and the sum of 1025*l.* being the said principal sum and another half year's interest thereon after the rate aforesaid, on the 8th day of May, which will be in the year of our Lord 1823; and if the said (mortgagors) or either of them, their or either of their heirs, executors, or administrators, do and shall make the said respective payments without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, at any time or times heretofore, and to be at any time and from time to time hereafter taxed, charged, assessed, or imposed on the said messuage or tenement and hereditaments hereby demised, or otherwise assured or intended so to be, or upon the said sum of 1000*l.* and interest, or any part thereof, or upon the said (mortgagees), or the survivor of them, his executors, administrators, or assigns, or any other person or persons whomsoever, upon account, or in respect of the said sum of 1000*l.*, or the interest thereof, or any part of the same respectively, or upon account, or in respect of the said messuage or tenement, and hereditaments hereby demised or otherwise assured or intended so to be, or any of them, or any part of the same, by authority of parliament or otherwise howsoever, or upon account, or in respect of any other matter, cause, or thing whatsoever: THEN, and in that case, immediately after such payments shall be made as aforesaid, the said term of 500 years hereby granted and demised; (AND ALSO one bond or writing obligatory, bearing even date with these presents, given and entered into by the said (mortgagors), jointly and severally, to the said (mortgagees), in the sum of 2000*l.* and conditioned for the payment of the sum of 1000*l.*, and interest for that sum; the said bond and these presents being given for the payment of the same sum of 1000*l.* and its interest, and not for divers sums and their interests) shall cease, determine, and be void to all intents and purposes whatsoever, any thing hereinbefore or in the said bond contained to the contrary thereof in anywise notwithstanding.

79. *Proviso for Re-conveyance.*

PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the said parties to these presents, as far as they respectively are interested, and the true intent and meaning of them and of these presents are and is, and these presents are upon this express condition, that if the said (*mortgagor*), his heirs, executors, administrators, or assigns, do and shall well and truly pay, or cause to be paid unto the said (*mortgagee*), his executors, administrators, and assigns, at or in his now dwelling-house situate at Badbury aforesaid, the full sum of 1350*l.* of lawful money current in England, with interest for the same after the rate of 4*l.* for every 100*l.*, by the year, in manner following: (that is to say), The sum of 27*l.* being one half year's interest on the said sum of 1350*l.*, after the rate aforesaid, on the 10th day of July now next ensuing, the day of the date hereof; and the sum of 1377*l.* being the whole principal money, and another half year's interest after the rate aforesaid, on the 10th day of January, which will be in the year of our Lord 1823; and do and shall make the said payments respectively, without any deduction, defalcation, or abatement whatsoever, out of the same, or any part thereof, for, or in respect of taxes, charges, payments, or other matter, cause, or thing already taxed, charged, or imposed, or hereafter to be taxed, charged, or imposed, upon the said message or tenement lands and hereditaments hereby released or otherwise assured or intended so to be, or any of them, or upon the said principal sum of 1350*l.*, or the interest thereof, or upon the said (*mortgagee*), his executors, administrators, or assigns, for or in respect thereof, by authority of parliament or otherwise howsoever: Then, upon or immediately after the latter of the said two several payments shall be made as aforesaid, he the said (*mortgagee*), his heirs and assigns, shall and will, upon the request, and at the costs and charges in all things of the said (*mortgagor*), his heirs and assigns, release, re-convey, and re-assure the said message or tenement lands and hereditaments hereby released, or otherwise assured or intended so to be, with their appurtenances, unto and to the use of, or in trust for, the said (*mortgagor*), his heirs and assigns, or unto such person or persons, for such uses, upon such trusts, and for such ends, intents, and purposes as the said (*mortgagor*), or his heirs, shall direct or appoint, freed and absolutely discharged of and from all incumbrances to be made, done, or committed by the said (*mortgagee*), his heirs, executors, administrators, or assigns, or any of them, in the mean time; so as for the doing thereof the said (*mortgagee*), his heirs, executors, administrators or assigns, be not compelled or compellable to go or travel from his or their then dwelling or place of abode, or respective dwellings or places of abode.

80. *Proviso for Redemption where the Money is intended to remain a given Time on Mortgage.*[See *infra*, No. viii.]

PROVIDED ALWAYS, [add preamble] do and shall well and truly pay, or cause to be paid, unto the said (*mortgagee*), his executors, administrators, and assigns, at or in the now dwelling-house of the said (*mortgagee*), situate at Fairford aforesaid, the said principal sum of 2500*l.* of lawful money current in England, with interest for the same, at and after the rate of 5*l.* for every 100*l.* by the year, at the times, and in manner following: (that is to say,) The sum of 62*l.* 10*s.* being half a year's interest for the said principal sum of 2500*l.*, after the rate aforesaid, on the 22d day of December now next ensuing the day of the date of these presents; the further sum of 62*l.* 10*s.* being another half year's interest for the said sum of 2500*l.*, after the rate aforesaid; on the 22d day of June, which will be in the year 1809, and the like further sum of 62*l.* 10*s.* being another half year's interest, on the 22d day of December, which will be in the said year 1809; and the like sum of 62*l.* 10*s.* on every 22d day of June, and 22d day of December, in every succeeding year, until the 22d day of June, which will be in the year 1811; and on the 22d day of June, which will be in the year 1811, the said sum of 2562*l.* 10*s.* being the said principal sum, and another half year's interest thereon, after the rate aforesaid, and do and shall make the said respective payments without any deduction, &c. Then, &c.

81. *Proviso for replacing Stock.*

PROVIDED ALWAYS, and it is hereby expressly declared and agreed, by and between the said parties hereto, and the true intent and meaning of them and of these presents are and is, that if the said (*mortgagor*), his heirs, executors, administrators, or assigns, do and shall, on or before the 8th day of October now next ensuing, well and truly purchase and transfer, or cause or procure to be purchased and transferred, unto and into the names of the said (*mortgagee*), his executors, administrators, and assigns, in the books of the Governor and Company of the Bank of England, the sum of 8000*l.* 4 per cent. consolidated bank annuities, and in the mean time do and shall answer and pay to the said (*mortgagee*), his executors, administrators, and assigns, such sum and sums of money as he would be entitled to receive, as and for the dividends on the said sum of 8000*l.* 4 per cent. consolidated bank annuities, in case the same had continued in the name of the said (*mortgagee*) in the books of the Governor and Company of the Bank of England, on the day and days respectively whereon such dividends would have become due and payable; and also all other costs, charges, and expences necessarily attending such re-transfer and purchase as aforesaid; and do and shall make such transfer and payments respectively, without any

deduction or abatement whatsoever; Then and in that case these presents, and every matter, clause, and thing herein contained, shall cease, determine, and be void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

82. *Proviso where Mortgage is to secure a Floating Balance to Bankers.*

PROVIDED ALWAYS, [add preamble] that if the said (*mortgagor*), his heirs, executors, administrators or assigns, do and shall well and truly pay or cause to be paid, unto the said A., B., C., and D., their executors, administrators, and assigns, when required by them or any of them, all and every such sum and sums of money as they or any or either of them should or might at any time or times advance, lend, or pay to the said (*mortgagor*), or by his means, or on his account or behalf, upon or by way of discount, or of cash given for any bill or bills of exchange or promissory note or notes, to be drawn or negotiated by the said (*mortgagor*) or by way of loan upon any such bill or bills, note or notes, or in case of any such bills being dishonoured, so as such payments and advances respectively do not exceed in the whole the sum of 3000*l.*, and if the said (*mortgagor*), his heirs, executors, administrators, or assigns, do and shall pay such sums respectively, together with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, from the day they shall be so respectively advanced and expended for his use or on his account as aforesaid, without any deduction, &c. Then, &c.

COVENANTS.*

83. *Preamble to a several Covenant by several Persons.*

AND each of them the said A. B. and C. doth hereby for himself respectively, and for his respective heirs, executors, and administrators, covenant, declare, and agree, to and with the said D., his heirs and assigns.

84. *Joint and several.*

AND the said A. B. and C. do hereby for themselves, jointly and severally, and for their joint and several heirs, executors, and administrators, covenant, declare, and agree, &c.

85. *Covenant by Mortgagees that he hath not incumbered.*

AND the said (*mortgagee*) doth hereby for himself, his heirs, executors, and administrators, covenant, declare, and agree, to and with the said (*mortgagor*), his heirs and assigns, that he the said (*mortgagee*) hath not, at any time or times heretofore, made, done, committed, or willingly or knowingly permitted, occasioned, or suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said messuage or tenement, closes of land and hereditaments, hereby assigned, or otherwise assured or intended so to be [or the said term of 500 years therein], or any part or parcel [thereof] [of the same respectively] are, is, can, shall, or may be impeached, charged, incumbered, or affected in title, [term,] charge, estate, or otherwise howsoever.

86. *Covenant that Assignor of Judgment hath not incumbered.*

AND the said (*assignor*) doth hereby for himself, his heirs, executors, and administrators, covenant, declare, and agree to and with the said (*purchaser*) his heirs and assigns, and to and with the said (*trustee*), his executors, administrators, and assigns, that he the said (*assignor*) hath not, at any time heretofore, made, done, committed, or knowingly suffered or omitted, not been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said judgment hereby assigned, or mentioned or intended so to be, can, shall, or may be discharged, vacated, defeated, or prejudicially affected, in any manner howsoever.

87. *Covenant for Payment of Money.*

AND the said (*mortgagor*) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said (*mortgagee*), his executors, administrators, and assigns, that he the said (*mortgagor*), his heirs, executors, and administrators, some or one of them, shall and will well and truly pay or cause to be paid unto the said (*mortgagee*), his executors, administrators, and assigns, the said principal sum of 5000*l.*, and the interest thereof, after the rate aforesaid, on the day and time in manner hereinbefore appointed for payment of the same, without any deduction or abatement on any account whatsoever, according to the true intent and meaning of these presents.

88. *Covenant for the Re-transfer of Stock and Payment of Dividends in the mean time.*

AND the said (*mortgagor*) doth hereby for himself, his heirs, executors, and administrators,

* The following covenants are interspersed through the succeeding numbers:—Covenant that premises shall remain on trusts, No. vi.—Covenants in the mortgage of a policy of insurance, No. ix. s. 4.—Covenant to suffer a recovery, No. xi.—Covenants for renewal, No. xviii. s. 2.—Covenant to levy a fine, No. xxx, and Covenant to surrender copyholds, No. xxxviii.

covenant, promise, and agree, to and with the said (*mortgagee*), his executors, administrators, and assigns, in manner following, that is to say, that he the said (*mortgagor*), his heirs, executors, and administrators, some or one of them, shall and will, on or before the 5th day of June now next ensuing, purchase and transfer, or cause or procure to be purchased and transferred, unto and into the name of the said (*mortgagee*), his executors, administrators, and assigns, in the books of the Governor and Company of the Bank of England, the sum of 853*l.*, 4 *per cent.* consolidated bank annuities, and in the mean time well and truly answer and pay to the said (*mortgagee*), his executors, administrators, and assigns, such sum and sums of money as shall be equal to the dividends on the said sum of 853*l.*, 4 *per cent.* consolidated bank annuities, which would have become due and payable in case the same annuities had not been transferred, in manner hereinbefore mentioned and appointed, and according to the true intent and meaning of these presents.

89. *Covenant that Mortgagor is seised in Fee.*

AND ALSO that he the said (*mortgagor*) is now seised to him and his heirs, of a good, sure, sole, lawful, absolute, and indefeasible estate of inheritance in fee simple, of and in the said messuages or tenements and hereditaments hereby released [*demised*], or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances, without any condition, trust, power of revocation, or of limitation, to use or uses, or any other power, restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, abridge, lessen, incur, or determine the same estate, or any part or parcel thereof.

90. *That Mortgagor hath in himself an absolute Power of Appointment.*

AND ALSO that he the said (*mortgagor*) now hath in himself the absolute power of appointing the fee simple [or, *the said term of 500 years hereby created*], of and in the messuages or tenements and hereditaments hereby appointed and released [*demised*], or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, without any condition, trust, power of revocation, or of limitation, to use or uses, or any other power, restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, abridge, lessen, incur, or determine the same power, estate or interest, in any manner howsoever.

91. *That Power is subsisting.*

AND ALSO that the said hereinbefore in part recited power of appointment, as far as the same relates to or concerns the said messuages or tenements and hereditaments hereby appointed and released [*demised*], or otherwise assured or intended so to be, is a good, valid, and subsisting power in the law, and not exercised, revoked, extinguished, suspended, defeated, altered, or avoided, in any manner howsoever.

92. *That Lease is valid, and Rent paid.*

AND ALSO that for and notwithstanding any act, deed, matter, or thing whatsoever, by him the said (*mortgagor*), or any person or persons whomsoever, at any time or times heretofore made, done, or committed to the contrary, the said hereinbefore in part recited indenture of lease, bearing date on or about the 25th day of June, in the year 1818, and the said hereinbefore in part recited indentures of assignment thereof, are good, valid, and subsisting assurances in the law, and the same indenture of lease is and stands in full force and virtue for all the residue of the said term of 96 years, and is in nowise merged, forfeited, surrendered, assigned, determined, or become void or voidable, or otherwise prejudicially affected in title, term, charge, estate, or otherwise howsoever (save and except only as appears by these presents). AND ALSO that the rents and covenants therein reserved and contained on the tenant's and lessee's part and behalf have been duly paid, observed, and performed up to the 25th day of June last.

93. *That Mortgagor has good right to release or demise.*

AND that he the said (*mortgagor*) now hath in himself good right, full power, and lawful and absolute authority by these presents, to grant, bargain, sell and convey [*demise*], the said messuages or tenements and hereditaments hereby released [*demised*], or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (*mortgagee*), his heirs and assigns, [*his executors, administrators, and assigns, for the term of 500 years hereby granted therein*] in manner aforesaid, and according to the true intent and meaning of these presents.

94. *That Mortgagor has good right to appoint.*

AND ALSO that he the said (*mortgagor*) now hath in himself good right, full power, and lawful and absolute authority, by these presents, to direct, limit, and appoint, grant, release, and confirm, [*bargain, sell, and demise*] the said messuage or tenement and hereditaments hereby appointed and released [*demised*], or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances—[*if in fee*] unto the said (*mortgagee*), his heirs and assigns for ever, according to the true intent and meaning of these presents—[*if by demise*] unto the said (*mortgagee*), his executors, administrators, and

assigns, for and during the said term of 500 years, according to the true intent and meaning of these presents.

95. *That Mortgagor has good right to assign Leasehold Premises.*

AND ALSO that he the said (*mortgagor*) now hath in himself good right, full power, and lawful and absolute authority, by these presents, to bargain, sell, assign, transfer, and set over, and also to demise, lease, and to farm let, the said messuage or tenement, and premises hereby demised and assigned, or otherwise assured, or intended so to be, and every part and parcel of the same, with their appurtenances, unto the said (*mortgagee*), his executors, administrators, and assigns, for and during all the residue and remainder of the said term of ninety-six years wanting six days as aforesaid, which is now to come and unexpired therein, in manner hereinbefore mentioned, according to the true intent and meaning of these presents.

96. *That Mortgagor, while in Possession, will pay Rent and perform Covenants, and indemnify Mortgagee.*

[See a similar covenant, *infra*, No. vi.]

AND THAT be the said (*mortgagor*), his executors, administrators, and assigns, during his continuance in possession of the said premises, under the proviso for that purpose lastly herein-after contained, and during the continuance of the said sum of 1000*l.*, or the interest thereof, or any part thereof on this security, shall and will well and truly pay the rent, and perform, fulfil, and keep all and singular the covenants and agreements in and by the said recited indenture of lease reserved and contained, and which on the tenant's or lessee's part and behalf are or ought to be paid, performed, fulfilled, and kept; and shall and will, at the costs and charges of the said (*mortgagor*), his executors, administrators, and assigns, during the period aforesaid, well and sufficiently save, defend, keep harmless, and indemnified, the said (*mortgagee*), his executors, administrators, and assigns, and every of them, of, from, and against the payment and performance of the same rents and covenants respectively, and of, from, and against all and all actions, suits, losses, costs, damages, and expences, claims and demands whatsoever to be incurred, sustained, or paid by the said (*mortgagee*), his executors, administrators, or assigns, for or by reason, or on account of the non-payment of the said rent, or non-performance of the said covenants and agreements, or any of them respectively.

97. *For quiet Enjoyment after Default.*

AND ALSO that it shall and may be lawful to and for the said (*mortgagee*), his *heirs*, [*executors, administrators,*] and assigns, *from time to time and at all times*, after default shall be made in payment of the said sum of 500*l.* and interest, contrary to the true intent and meaning of these presents, and of the proviso or agreement for redemption hereinbefore contained [*and thenceforth during the residue of the said term of 500 years hereby granted and demised*], peaceably and quietly to enter into and upon, have, hold, use, occupy, possess, and enjoy the said messuages or tenements lands and hereditaments, hereby released, [*demised,*] or otherwise assured or intended so to be, with their and every of their rights, members, and appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part and parcel of the same, without any let, suit, trouble, eviction, ejection, expulsion, interruption, or denial whatsoever, of, from, or by him the said (*mortgagor*), his *heirs*, executors, administrators, or assigns, or any other person or persons whomsoever (save and except as hereinafter is excepted).

98. *Free from Incumbrances.*

AND THAT free and clear, and freely, clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by him the said (*mortgagor*), his *heirs*, executors, or administrators, at his and their own costs and charges in all things, well and sufficiently protected, defended, saved harmless and kept indemnified, of, from, and against all and all manner of former and other gifts, grants, feoffments, leases, mortgages, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, entails, annuities, legacies, rent-charges, rents seek, rent services, and all arrears of rent, and also of, from, and against all and all manner of fines, issues, americiaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the king's majesty, or any of his predecessors, sequestrations, estates, titles, troubles, liens, charges, and incumbrances whatsoever.

99. *Exceptions.*

(THE land-tax charged or chargeable upon, or which shall henceforth become payable for or in respect of the said hereditaments hereby released [*demised*] or otherwise. or intended so to be, and the leases under which the said premises are held by the present tenants or occupiers thereof, at rack or improved rents, and also a certain term of 200 years now vested in A. B. of, &c. and assigned to C. D. of, &c. in trust for the said (*mortgagee*), his *heirs*, [*executors, administrators*] and assigns, by indenture bearing even date with these presents, and made, &c., always excepted and foreprized.)

100. *For further Assurance.*

AND MOREOVER that he the said (*mortgagor*) and his *heirs* [or his *heirs*, executors, and adminis-

trators] and all and every other person and persons whosoever, lawfully or equitably and rightfully claiming, or to claim, any estate, right, title, trust, charge, or interest at law or in equity, or otherwise howsoever, of, in, to, out of, or upon the said messages or tenements and hereditaments hereby released [demised], or otherwise assured or intended so to be, or any part thereof, shall and will from time to time, and at all times hereafter during the continuance of the said sum of 500*l.* on this security, [or, during the continuance of the said term of 500 years, and the said sum of 500*l.* on this security] upon every reasonable request of the said (mortgagee), his heirs, executors, administrators, or assigns, but at the costs and charges in all things of the said (mortgagor), his heirs, executors, and administrators, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, either by fine or fines, with or without proclamation, common recovery or recoveries, deed or deeds, enrolled or not enrolled, release, confirmation, or other assurance whatsoever, for the further, better, more perfectly, lawfully and absolutely, or satisfactorily granting, releasing [demising], confirming, or otherwise assuring the said messages or tenements and hereditaments, hereby released [demised] or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances, unto [and to the use of] the said (mortgagee), his heirs, [executors, administrators,] and assigns, [for all the residue of the time of the said term of 500 years, which shall be therein, then to come and unexpired] according to the true intent and meaning of these presents, as by the said (mortgagee), his heirs, executors, administrators, and assigns, or his or their counsel in the law shall be reasonably devised or advised and required, and tendered to be made, done, and executed.

101. *Covenant for further Assurance in a Mortgage by Demise, with Agreement to convey the Fee to the Mortgagee after Default.*

[Antea, p. 9, of this edition, n. (I).]

AND MOREOVER that he the said (mortgagor) and his heirs, and all and every other person and persons claiming, or to claim, any estate, right, title, trust, charge, or interest, of, in, to, out of, or upon the said hereditaments, hereby demised or intended so to be, or any part thereof, by, from, through, under, or in trust for him, them, or any or either of them, shall and will from time to time, and at all times hereafter, upon every reasonable request of the said (mortgagee), his executors, administrators, and assigns, but at the costs and charges of the said (mortgagor), his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, not only for the further, better, more perfectly and absolutely, or satisfactorily granting, demising, and assuring the said messages, tenements, and hereditaments, and every part and parcel thereof, unto the said (mortgagee), his executors, administrators, and assigns, for and during all the residue and remainder which shall be then to come and unexpired, of and in the said term of 500 years hereby granted thereof, but also from and after default shall be made in payment of the said sum of 500*l.* and the interest thereof, at the time and in manner hereinbefore appointed for payment of the same, for granting, releasing, conveying, and assuring the fee-simple, reversion, and inheritance of the said hereditaments, with their and every of their rights, members, and appurtenances, unto, and to the use of, or in trust for the said (mortgagee), his heirs and assigns, or as he or they shall direct or appoint, in such manner and form as the said (mortgagee), his heirs or assigns, or his or their counsel in the law shall reasonably devise or advise and require, and tender to be made, done, and executed.

102. *Covenant for further Assurance in Mortgage of Leasehold Property, which contained Powers for Sale.*

AND MOREOVER that he the said (mortgagor), his executors and administrators, and all and every other person or persons whosoever, lawfully or equitably, and rightfully claiming, or to claim, any estate, right, title, trust, charge, or interest, at law or in equity, of, in, to, out of, or upon the said message or tenement and premises, hereby assigned and demised, or otherwise assured or intended so to be, or any part thereof, shall and will from time to time, and at all times hereafter during the continuance of the said sum of 700*l.* on this security, upon every reasonable request of the said (mortgagee), but at the costs and charges in all things of the said (mortgagor), his executors and administrators, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, assignments, and other assurances in the law whatsoever, for the further, better, more perfectly, lawfully and satisfactorily assigning, confirming, or otherwise assuring the said messages or tenements, and premises hereby demised and assigned, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (mortgagee), his executors, administrators, and assigns, thenceforth for and during all the residue and remainder of the said term of ninety-six years wanting six

days as aforesaid, which shall be therein then to come and unexpired, upon the trusts nevertheless, and to and for the several ends, intents, and purposes, and with, under, and subject to the several powers, provisoes, declarations, and agreements hereinbefore and hereafter contained, or with, under, and subject to such and so many of them as shall be then subsisting, according to the true intent and meaning of these presents, as by the said (*mortgagee*), his executors, administrators, and assigns, or his or their counsel in the law shall be reasonably devised or advised and required, and tendered to be made, done, and executed.

103. *Covenant to insure against Fire.*

AND FURTHER that he the said (*mortgagor*), his heirs, executors, or administrators, shall and will, during the continuance of the said sum of 800*l.* on this security, at his own costs and charges, insure and keep insured, from loss or damage by fire, the said message or tenement erections and buildings, hereby released, [demised], or otherwise assured or intended so to be, in the joint names of them the said (*mortgagor*) and (*mortgagee*), in no less a sum than 800*l.* in the West of England Fire Insurance Office, or in some other good and reputable office for insuring buildings against loss or damage by fire, and that all and every the policy and policies of insurance of the said message or tenement erections and buildings, shall stand and be a security or securities for payment of the said sum of 800*l.* hereby lent and advanced, and the interest thereof, jointly with these presents; and in case of any loss or damage by fire happening to the said message or tenement erections and buildings, that then the money or monies due or recoverable upon the said policy or policies of insurance shall be received by, or immediately upon the recovery thereof, be paid to the said (*mortgagee*), his executors, administrators, and assigns, and be by him or them, so far as the same will extend, fully and faithfully applied, laid out, and expended, in rebuilding, repairing, and reinstating the said message or tenement erections and buildings; and the messages or tenements erections and buildings, when so rebuilt, repaired, and reinstated, shall stand and be a security for, and be charged and chargeable with, the re-payment of the said principal sum of 800*l.* and interest to the said (*mortgagee*), his executors, administrators, and assigns, in manner hereinbefore mentioned, according to the true intent and meaning of these presents.

104. *Mortgagor to enjoy till Default.*

PROVIDED LASTLY, and it is hereby declared and agreed, by and between the said parties to these presents, and the said (*mortgagee*) doth hereby consent and agree, that in the mean time, and until default shall happen to be made in payment of the said sum of 500*l.* and the interest thereof, contrary to the true intent and meaning of these presents, and of the proviso or agreement for redemption hereinbefore contained, it shall and may be lawful to and for the said (*mortgagor*), his heirs and assigns, to hold, occupy and enjoy, and receive and take the rents, issues, and profits of the said messages or tenements, and hereditaments hereby released, [demised], or otherwise assured or intended so to be, with their and every of their rights, members, and appurtenances, without any let, suit, trouble, hindrance, interruption, or denial whatsoever, of, from, or by the said (*mortgagee*), his heirs, [executors, administrators,] and assigns, or from or by any other person or persons whosoever, lawfully or equitably claiming, or to claim by, from, through, under, or in trust for him, them, or any or either of them, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS, &c.

105. *Covenant that Money lent shall remain on Mortgage for a given Time.**

AND IT IS HEREBY covenanted, declared, and agreed, by and between the said parties to these presents, that the said principal sum of 500*l.* shall and lawfully may be and remain a mortgage debt on the security of the said hereditaments hereby granted and demised, or otherwise assured or intended so to be, for the term of three years, and that neither the said (*mortgagee*), his executors, administrators, or assigns, or any or either of them, shall or will institute any suit or proceeding to foreclose the said mortgage, or commence any action, suit, or other process for obtaining possession of the said hereditaments, either by virtue of these presents, or by virtue of the said recited bond, bearing even date herewith, during the period of three years, commencing from the day of the date of these presents, unless default shall be made in payment of the interest of the said sum of 500*l.* after the rate aforesaid, on the quarterly days of payment hereinbefore appointed for payment of the same, or within one calendar month next after any or either of the said quarterly days respectively, in which case it shall and may be lawful to and for the said (*mortgagee*), his executors, administrators, and assigns, to proceed for the recovery of the sum of 500*l.*, or to foreclose the equity of redemption of the said (*mortgagor*), his heirs and assigns, and in all respects to prosecute his remedies as mortgagee, in like manner as if this present covenant had not been contained in these presents: NOR shall the said (*mortgagor*), his heirs, executors, administrators, or assigns, institute any suit or proceed-

* See ante, p. 16, of this edition, n. (M). In the case of *Stanhope v. Manners*, 2 Eden, 197, a covenant of this kind was entered into and held binding. It was contained in a separate instrument of even date with the mortgage.

ing to redeem the said hereditaments and premises hereby demised, or otherwise assured or intended so to be, until the full end and expiration of the said term of three years, commencing as aforesaid.

106. *Provide that Mortgagee shall not call in Money under Six Months Notice.*

PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the said parties to these presents, that the said (mortgagee), his executors, administrators, and assigns, shall not, nor will call in or compel payment of the said principal sum of 4000*l.* intended to be hereby secured, without giving to the said (mortgagor), his heirs, executors, or administrators, six calendar months notice in writing, demanding payment of the same principal money, or leaving the said notice at the last or most usual place of abode of the said (mortgagor), his heirs, executors, or administrators, or with his solicitor or solicitors for the time being.

107. *Agreement to abate Interest on punctual Payment.*

PROVIDED ALWAYS, and the said (mortgagee) for himself, his heirs, executors, and administrators, doth hereby covenant, declare, and agree, to and with the said (mortgagor), his heirs, executors, administrators, and assigns, that if the said (mortgagor), his heirs, executors, administrators, or assigns, do and shall, during the continuance of the said sum of 700*l.*, or any part thereof on this security, well and truly pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, interest for the said sum of 700*l.*, after the rate of 4*l.* 10*s.* for every 100*l.* by the year, by equal half-yearly payments, on the said 21st day of June and 21st day of December in each year, or within one calendar month next after each or either of the said days respectively, then and in such case, but not otherwise, he the said (mortgagee), his executors, administrators, and assigns, shall and will accept and take the same in lieu of and full satisfaction for interest on the said sum of 700*l.*, after the rate of 5*l.* per centum per annum in manner hereinbefore covenanted and agreed to be paid for the same; and shall and will from time to time sign and give proper and sufficient acquittances and discharges for the same interest at 5*l.* per cent. accordingly, any thing hereinbefore [or in the said in part recited bond, or the condition thereunder written] contained to the contrary thereof in anywise notwithstanding.

108. *Covenant by Purchaser of Equity of Redemption to pay off Mortgage, and indemnify Vendor.*

AND the said (purchaser) for himself, his heirs, executors, and administrators, doth hereby covenant, grant, declare, and agree, to and with the said (mortgagor), his heirs, executors, and administrators, that he the said (purchaser), his heirs, executors, or administrators, some or one of them, shall and will well and truly pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, the said principal sum of 800*l.* so due and owing to him on his said recited securities as aforesaid, together with interest for the same sum, after the rate of 5*l.* for every 100*l.* by the year, on the days and times, and in manner in and by the said hereinbefore in part recited indenture of mortgage appointed for payment thereof, and also shall and will from time to time, and at all times hereafter, well and effectually save, defend, keep harmless, and indemnified, the said (mortgagor), his heirs, executors, and administrators, and his and their goods and chattels, lands and tenements, of, from, and against the payment of the same principal money and interest respectively, and all actions, suits, proceedings, costs, charges, and expences, which shall or may be prosecuted or instituted, or be incurred or occasioned by, or by reason of any default or delay in payment of the said sum of 800*l.* and interest, or either of them, or any part thereof respectively, or by reason or on account of any other act, deed, matter, or thing whatsoever, of or concerning the non-payment of the said sum of 800*l.* and interest respectively by the said (purchaser), his heirs, executors, administrators, or assigns, or any or either of them.

109. *Declaration that Money due on Mortgage shall be paid out of the Purchaser's personal Estate.*

[Antea, p. 887, of this edition, n. (P).]

PROVIDED ALWAYS, and the said (purchaser) doth hereby expressly declare and direct, that as between the heirs and assigns of him the said (purchaser), and his executors or administrators, the said sum of 800*l.* so charged or secured upon the lands and hereditaments hereinbefore described, and hereby released, or otherwise assured or intended so to be as aforesaid, shall be considered as the proper debt of him the said (purchaser), and be charged and chargeable upon, and paid off and satisfied out of his personal estate, property, and effects accordingly, or so far as the same will extend; and that neither the said lands and hereditaments so charged with the payment thereof in manner hereinbefore recited, or any of them, nor the heirs or assigns of the said (purchaser), shall be, or be deemed subject or liable to the payment thereof, or of any part thereof, or of any arrears of interest due for the same, except only so far as the personal estate and effects of him the said (purchaser), shall fall short and be insufficient to pay or satisfy the same.

110. *Declaration that outstanding Terms shall be held in Trust for the Mortgagee, and then to attend the Inheritance.*

AND IT IS HEREBY declared and agreed, by and between the said (mortgagor) and (mortgagee),

that all and every term and terms of years now subsisting, which in anywise affect the same several messuages or tenements and hereditaments hereby released or otherwise assured or intended so to be, or any part or parcel thereof respectively, shall from henceforth be and remain; and the person or persons possessed thereof, or interested therein respectively, his, her, or their respective executors or administrators, shall from henceforth stand and be possessed thereof and interested therein respectively, and of the hereditaments and premises therein respectively comprised, in trust for the said (*mortgagee*), his heirs, executors, administrators, and assigns, for further better and more effectually securing unto him and them the payment of the said sum of 2500*l.* and the interest for the same, until the same shall be paid, according to the purport, true intent, and meaning of these presents, and the proviso or agreement for redemption hereinbefore contained; and from and after payment thereof, in trust for the said (*mortgagor*), his heirs and assigns, and to be disposed of as he or they shall direct and appoint; and in the mean time to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same hereditaments and premises, to the end to protect and defend the same from all meane charges and incumbrances, if any such there are or may be.

No. II. § 1.

MORTGAGE IN FEE.

Lease for a Year.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part, WITNESSETH, that for and in consideration [*nominal consideration*, No. I. pl. 61]; He the said (*mortgagor*) hath bargained and sold, and by these presents, BOTH bargain and sell unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT [*parcels as in the release, including houses and reversion*]. TO HAVE AND TO HOLD the said messuage or tenement, lands, tithes, hereditaments, and all and singular other the premises hereby bargained and sold, or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances, unto the said (*mortgagee*), his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during and unto the full end and term of one whole year thence next ensuing, and fully to be complete and ended; YIELDING AND PAYING therefore, unto the said (*mortgagor*), his heirs and assigns, the rent of one pepper corn on the last day of the said term, if the same shall be lawfully demanded; TO THE INTENT and purpose, that by virtue of these presents and by force of the statute made for transferring uses into possession, the said (*mortgagee*) may be in the actual possession of the hereby bargained and sold premises, and be thereby enabled to accept and take a good and sufficient grant and release of the reversion and inheritance thereof to him and his heirs, according to the purport, true intent and meaning of a certain indenture of release by way of mortgage already prepared, and intended to bear date the day next after the day of the date of these presents, and made or expressed to be made between the same persons as are parties hereto [or, between the said (*mortgagee*) of the one part, &c. as in the release]. IN WITNESS, &c.

Release.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part [*Recite that mortgagor is seized in fee, and that he has occasion to borrow*, No. I. pl. 1. 4.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [*add consideration*, No. I. pl. 62.]; He the said (*mortgagor*) hath granted, bargained and sold, aliened, released, and confirmed, and by these presents, BOTH grant, bargain, sell, alien, release, and confirm unto the said (*mortgagee*) in his actual possession, &c. [*recite lease*, No. I. pl. 68.], and to his heirs, ALL THAT [*describe parcels—Add general words*, No. I. pl. 70. *reversion*, ib. pl. 72, *estate*, ib. pl. 73, *no deeds*.] TO HAVE AND TO HOLD the said messuage or tenement, lands, tithes, hereditaments, and all and singular other the premises hereby released or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (*mortgagee*) and his heirs, to the use of the said (*mortgagee*), his heirs and assigns for ever; subject nevertheless to the proviso or agreement for redemption hereinafter contained: that is to say, [*Add proviso*, No. I. pl. 77. *Covenants for payment of money*, ib. pl. 87. *That mortgagor has good right to release*, ib. pl. 93. *That mortgagee shall enjoy after default*, ib. pl. 97. *Free from incumbrances*, ib. pl. 98. *For further assurances*, ib. pl. 100. *And proviso that mortgagor shall enjoy till default*, ib. pl. 104.] IN WITNESS, &c.

* As a mortgage without actual delivery of the deeds is subject to great risk, the grant of deeds is seldom inserted.

No. II. § 2.

MORTGAGE IN FEE

By Appointment and Release.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [*Recite deed conferring power, No. I. pl. 20, and mortgagor's occasion to borrow, ib. pl. 4.*] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration [*add money consideration, No. I. pl. 62*]; HE the said (*mortgagor*) by virtue and in pursuance, and in exercise and execution of the power or authority, powers or authorities, given, limited, and reserved to him in and by the said hereinbefore in part recited indenture of release, and also by virtue and in pursuance, and in exercise and execution of all and every other power and powers, authority and authorities to him given, limited, and reserved, or in him vested, or in anywise enabling him the said (*mortgagor*) in this behalf, DOTH, by this his present deed or instrument in writing, signed, sealed, and delivered by him, in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed, as witnesses attesting the execution of these presents by the said (*mortgagor*) DIRECT, limit, and appoint, THAT ALL THOSE pieces or parcels of land and hereditaments hereinafter more particularly described, and also released or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, shall go, remain, continue, and be; and that the said hereinbefore in part recited indentures of lease and release, and all other conveyances and assurances thereof, shall henceforth operate, be, and enure as to the same hereditaments, TO THE USE of the said (*mortgagee*), his heirs and assigns for ever, subject, nevertheless, to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE FURTHER WITNESSETH, that for the considerations hereinbefore expressed, he the said (*mortgagor*) hath granted, bargained, sold, aliened, released, and confirmed, and by these presents DOTH grant, bargain, sell, alien, release, and confirm unto the said (*mortgagee*) (in his actual possession, &c.) [*recite lease, No. I. pl. 68*], and to his heirs, ALL THOSE [*describe parcels—Add general words, No. I. pl. 70; reversion, ib. pl. 72; estate, ib. pl. 73.*] TO HAVE AND TO HOLD the said pieces or parcels of land, hereditaments, and all and singular other the premises hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (*mortgagee*), and his heirs, TO THE USE of the said (*mortgagee*), his heirs and assigns for ever; but subject nevertheless to the proviso or agreement for redemption hereinafter contained, that is to say, [*Add proviso, No. I. pl. 77. Covenant for payment of money, ib. pl. 87. That power is subsisting, ib. pl. 91. That mortgagor has good right to appoint and release, ib. pl. 94. That mortgagee shall enjoy after default, ib. pl. 97. Free from incumbrances, ib. pl. 98. For further assurances, ib. pl. 100. Proviso that mortgagor shall enjoy till default, ib. pl. 104.*] IN WITNESS, &c.

No. III. § 1.

MORTGAGE BY DEMISE.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [*Recite that mortgagor is seised in fee, No. I. pl. 1, and that he has occasion to borrow, No. I. pl. 4.*] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [*add consideration, No. I. pl. 62*]; HE the said (*mortgagor*) hath granted, bargained, sold, and demised, and by these presents DOTH grant, bargain, sell, and demise, unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT [*add parcels—general words, No. I. pl. 70; reversion, ib. pl. 72; neither estate nor deeds.*] TO HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereby demised, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (*mortgagee*), his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of 500 years from thence next ensuing, and fully to be complete and ended, (subject nevertheless to the proviso or agreement for redemption hereinafter contained), YIELDING AND PAYING to the said (*mortgagor*), his heirs and assigns, yearly during the said term, the rent of one pepper corn, if the same shall be lawfully demanded. [*Add proviso, No. I. pl. 77. Covenant for payment of money, ib. pl. 87. That mortgagor has good right to demise, ib. pl. 93. That mortgagee shall enjoy after default, ib. pl. 97. Free from incumbrances, ib. pl. 98. For further assurances, ib. pl. 100. Proviso that mortgagor shall enjoy till default, ib. pl. 104.*] IN WITNESS, &c.

No. III. § 2.

MORTGAGE

By Appointment and Demise.

THIS INDENTURE, &c.—[the same as in No. II. §. 2. to “the use,” then proceed thus]. TO THE USE of the said (mortgagee), his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during and unto the full end and term of 500 years from thence next ensuing and fully to be complete and ended, subject nevertheless to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE FURTHER WITNESSETH, that for the considerations hereinbefore expressed, he the said (mortgagor) hath granted, bargained, sold, and demised, and by these presents DOth grant, bargain, sell, and demise, unto the said (mortgagee), his executors, administrators, and assigns, ALL THAT [insert parcels—General words, No. I. pl. 70; reversion, ib. pl. 72; and add the same habendum and reddendum as in the preceding form, No. III. s. 1.—Proviso for redemption, No. I. pl. 77. Covenant for payment of money, ib. pl. 87. That power is valid, ib. pl. 91. That mortgagor has good right to appoint and demise, ib. pl. 94. That mortgagee shall enjoy after default, ib. pl. 97. Free from incumbrances, ib. pl. 98. For further assurances, ib. pl. 100. Proviso that mortgagor shall enjoy till default, ib. pl. 104.] IN WITNESS, &c.

No. IV.

CONVEYANCE IN FEE,

And Mortgage for Years, where the Purchaser takes up Money to pay for the Estate.

THIS INDENTURE of four parts, made, &c.—BETWEEN (vender) of the first part, (purchaser) of the second part, (mortgagee) of the third part, and (trustee) of the fourth part. [Recite contract for purchase, and that mortgagee has agreed to advance part of money on security of premises purchased, No. I. pl. 14]. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreements, and for and in [add consideration, No. I. pl. 66]; HE the said (vender) at the instance and request, and by the direction and appointment as well of the said (purchaser) as of the said (mortgagee), testified by their respective executions of these presents, hath granted, bargained, sold, aliened, released, and confirmed, and by these presents DOth grant, bargain, sell, alien, release, and confirm unto the said (trustee), (in his actual possession, &c.) [recite lease, No. I. pl. 68], and to his heirs, ALL THAT [describe parcels.—Add general words, No. I. pl. 70; reversion, ib. pl. 72; estate, ib. pl. 73; and deeds.] TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said (trustee) and his heirs, to the uses, upon the trusts, and for the ends intents and purposes hereinafter limited, expressed, and declared, of and concerning the same, that is to say, TO THE USE of the said (mortgagee), his executors, administrators, and assigns, for and during and unto the full end and term of 500 years, to commence and be computed from the day next before the day of the date of these presents, without impeachment of or for any manner of waste, other than wilful and destructive waste; subject nevertheless to the proviso or agreement for redemption hereinafter contained AND from and after the expiration, or other sooner determination of the said term of 500 years, and in the mean time subject thereto, TO THE USE of the said (purchaser), his heirs and assigns, for ever, [or, to uses to bar dower, as the case may require—Add proviso for cesser of term, No. P. pl. 77—omitting of course the latter part of the clause vacating every thing contained in the deed.—Insert also special covenants by the vendor with the purchaser that the former has good right to convey; that the premises shall remain to the uses aforesaid, free from incumbrances; and for further assurances; and by the purchaser with the mortgagee, for payment of the money; for quiet enjoyment after default; free from incumbrances; for further assurances; and proviso that mortgagor shall enjoy till default.] IN WITNESS, &c.

No. V.

REFERENCE was made to this place, ante, p. 9. of this edition, n. (I), for a covenant which may be found in No. I. of this Appendix, pl. 101.

No. VI.

MORTGAGE, WITH POWER OF SALE.*

[Antea, p. 13, of this edition, n. (K). § 965. ib. n. (A).]

THIS INDENTURE, &c.—[Proceed as in a common mortgage, down to the proviso for redemption, adding that proviso vacating the deed on payment of the money on the day appointed. Immediately after which add the following powers, declarations, and covenants.] AND IT IS HEREBY FURTHER DECLARED and agreed, by and between the said parties. Power of sale, to these presents, and the said (mortgagor) doth hereby direct and appoint, that in case default shall happen to be made in payment of the said sum of 1000*l.* and interest, at the time and place, and in manner hereinbefore appointed for payment thereof, contrary to the true intent and meaning of these presents and the proviso or condition for redemption hereinbefore contained; it shall and may be lawful to and for the said (mortgagee) his heirs, [executors, administrators] and assigns, and he and they is and are hereby required, authorised, and empowered, of his and their own proper authority, without any further consent or concurrence of the said (mortgagor) his [heirs, executors, administrators] or assigns (and notwithstanding the heirs, [executors, administrators], or assigns of the said (mortgagor), may be under age, or under any other disability), at any time or times thereafter, when he or they in his or their discretion shall think proper (without prejudice however to the right of action on the part of the said (mortgagor), his heirs, [executors, administrators], and assigns, under the covenant or covenants of the said (mortgagee) hereinafter contained) to make sale, and absolutely dispose of the said message or tenement, and hereditaments, [premises] hereby released, or otherwise assured or intended so to be, or any part of the same, and the fee simple and inheritance thereof, free from all incumbrances, [hereby assigned and demised, or otherwise assured or intended so to be, or of any part of the same, for all the residue of the said term of ninety-six years, wanting six days, which shall be then to come and unexpired therein] either altogether in one lot or by parcels, and in several lots, and either by public auction or by private contract, or partly by public auction and partly by private contract, with liberty, if he or they shall think fit, to buy in the said hereditaments [premises] at any auction, and to re-sell the same at any future auction, or by private contract, without being and to convey absolutely. liable to answer for any loss or diminution in price;† And with full power and lawful and absolute authority for him the said (mortgagee), his heirs, [executors, administrators,] and assigns, to convey [assign, transfer] and assure the said message or tenement, and hereditaments, [premises] hereby released [demised and assigned], or otherwise assured or intended so to be, when so sold as aforesaid, unto the person or persons who shall agree to become the purchaser or purchasers thereof, and to his, her, or their heirs, [executors, administrators,] and assigns, or to such other person or persons as he, she, or they shall direct or appoint, freed and absolutely discharged of and from the proviso or agreement for redemption hereinbefore contained, and all other trusts, powers, provisos, and agreements herein-after mentioned, expressed, and declared, of and concerning the same. AND Money arising from sale to be applied, IT IS HEREBY further declared and agreed, by and between the said parties to these presents, that from and immediately after default shall happen to be made in payment of the said principal sum of 1000*l.* and interest, at the time and place and in manner hereinbefore mentioned for payment of the same, and until such sale or sales shall be made and take place as aforesaid, HE the said (mortgagee), his heirs, executors, administrators, and assigns, shall stand and be seized or possessed of and interested in the said message or tenement and hereditaments [premises] hereby released [demised and assigned], or otherwise assured or intended so to be, and every part and parcel of the same,

* This mode of mortgaging is still in its infancy. The particular form for general use has not yet been decided on. Some gentlemen recommend the omission of the proviso for redemption; that by so converting the instrument into a deed for payment of debts, the strict rules respecting the equity of redemption may be evaded. See 3 Bar. Elem. 349. 1st edition. Others limit the estate to the mortgagee for years, with remainder to a trustee in fee, on trust to sell in case of default. In the above precedent a mortgage, with all its incidents, is preserved, and the mortgagee is empowered to sell, if his money be not paid at the expiration of three months notice. This mode best accomplishes the object intended, though it should be observed that either of the before-mentioned plans may be equally operative.

••• Omitting the italics not within brackets, but preserving those so inclosed, this precedent may be adapted to a mortgage of leasehold property.

† In a case which recently occurred in practice, an estate was conveyed to a trustee upon trusts for absolute sale, without or with the concurrence of the owner, and out of the proceeds of the sale to pay divers incumbrances. The trustee offered the estate to sale by auction in lots, where it was bought in. He afterwards sold the entire estate to a purchaser by private contract. An eminent conveyancer was of opinion, that as the owner violently opposed the sale, and the trustee had not offered the estate in one lot publicly, the trustee was not justified in conveying to the purchaser. If the above words had been inserted in the trust deed, this difficulty could not have arisen.

with their and every of their rights, members, and appurtenances; and also of all and singular the money which shall arise and be produced by any such sale or sales as aforesaid, upon the trusts following (that is to say), UPON TRUST that he the said (mortgagee), his heirs, [executors, administrators,] and assigns, do and shall, by and out of the rents and profits of the said messuage or tenement and hereditaments [premises], or by and out of the proceeds of the said

sale or sales, or by and out of any monies which shall come into his or their hands by virtue of these presents, in the first place deduct and retain to *first, in payment of expences,* and for himself and themselves respectively, the costs, charges, and expences, of and attending the execution of the powers and trusts hereby reposed in

him and them, and the money which he or they respectively shall or may disburse for taxes, rents, insurance, and repairs of the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be, or in or about [the performance of any covenant, proviso, condition, or agreement contained in the said hereinbefore in part recited indenture of lease or underlease, bearing date on or about the 25th day of June, 1818] or in or about any suit or suits at law or in equity, for obtaining possession of the said messuage or tenement and hereditaments [premises], or in enforcing the performance of any contract or contracts, with any person or persons who shall agree to become the purchaser or purchasers of the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be (all such costs, charges, damages, and expences respectively to bear interest after the rate of 5l. for every 100l. by the year, from the day such payments shall be made respectively): And in the next place do and shall retain and pay unto and for himself and themselves respectively the said principal sum of 1000l., or so much thereof as shall then remain unsatisfied, and all interest for the same (after the rate aforesaid), which shall have accrued due and shall not have been discharged, from the day of the date of these presents, up to and inclusive of the day

then to pay mortgage money, and surplus to mortgagor,

whereon the said sum of 1000l., or the remaining part thereof, shall be fully paid and satisfied. AND UPON FURTHER TRUST that he the said (mortgagee), his heirs, executors, administrators, and assigns, after paying the costs, charges, disbursements, and expences, of and attending the execution of the powers and trusts hereby reposed in him and them, or anywise in relation thereunto, and after receiving the said principal sum of 1000l. and interest as lastly aforesaid, do and shall pay the residue or overplus (if any) of the monies which shall then remain in his or their hands unapplied for any of the purposes aforesaid, unto

and to convey to him premises unsold.

the said (mortgagor), his executors, administrators, assigns, or unto such person or persons as he or they shall direct or appoint; and also do and shall, at the costs, charges, and expences of the said (mortgagor), his heirs, [executors, administrators,] and assigns, convey, [assign, transfer] and assure unto the said (mortgagor), his heirs, [executors, administrators,] and assigns, or unto such person or persons as he or they shall direct or appoint, all such and so many and such part and parts of the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be, as shall remain unsold for any of the purposes aforesaid, freed and absolutely discharged of and from all estates, liens, charges, and incumbrances whatsoever, to be had, made, done, occasioned, permitted, or suffered by the

Indemnity to purchasers.

said (mortgagee), his heirs, [executors, administrators,] and assigns, in the mean time. AND it is hereby further DECLARED AND AGREED, by and between the said parties to these presents, and the said (mortgagor) doth hereby for himself, his heirs, executors, administrators, and assigns, direct and appoint, that

the person or persons who shall agree to become the purchaser or purchasers of the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be, and pay his, her, or their purchase money, or any part thereof to the said (mortgagee), his heirs, [executors, administrators,] or assigns, shall not be obliged or required to see to the application of the same money, or any part thereof, nor be answerable or accountable for the misapplication or non-application of the same, nor be required to see that previous notice of sale as hereinafter mentioned hath been given to the said (mortgagor), his heirs, [executors, administrators,] or assigns, nor be affected with express knowledge that no such notice hath been given, nor be obliged to inquire whether the sum or sums raisable under

Receipts to be good discharges: and sale conclusive.

the powers hereinbefore reserved and contained, are or were then owing to the said (mortgagee), his executors, administrators, and assigns: AND THAT ALL and every the receipt or receipts which shall be given for the said purchase money, or any part thereof, by the said (mortgagee), his heirs, [executors, administrators,] and assigns, shall be good and sufficient discharges for the sum or sums of money which shall be therein or thereby expressed or

acknowledged to be or to have been received: And that such sale to be so made, and contract for sale to be so entered into, and conveyance [assignment] which shall be so executed by the said (mortgagee), his heirs, [executors, administrators,] and assigns, as aforesaid, shall be binding and conclusive on the said (mortgagor), his heirs, [executors, administrators,] and assigns, to all intents and purposes whatsoever, as fully and effectually as if such sale had been made and contract entered into, and conveyance executed by the said (mortgagor), his heirs, [executors, administrators,] and assigns, personally. AND

Covenant by mortgagee to

THE SAID (mortgagee) (by way of agreement and not of condition, and so

only as to charge himself, his heirs, executors, and administrators with damages, for the breach or non-performance of his covenant hereinafter contained, and not to affect the person or persons who shall become a purchaser or purchasers under the powers and trusts hereinbefore declared and contained, although he, she, or they might have clear and express knowledge that no such notice as hereinafter is mentioned hath been given) doth hereby for himself and for his heirs, executors, and administrators, covenant, promise, and agree, to and with the said (mortgagor), his heirs, [executors, administrators,] and assigns, that no sale or notice of sale of the said message or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be, shall be made or given by the said (mortgagee), his heirs, [executors, administrators,] or assigns, or any means taken by him or them for obtaining possession or entering into the receipt of the rents and profits of the said message or tenement and hereditaments [premises] before and until such time as he or they respectively shall have given to the said (mortgagor), his heirs, [executors, administrators,] and assigns, or have left at his or their last or most usual place of abode in England, three calendar months notice in writing, demanding payment of the principal and interest monies which, at the end of that time, shall be due to the said (mortgagee), his executors or administrators, and the said (mortgagor), his heirs, executors, administrators, and assigns, shall have made default in payment thereof at the end of the said three calendar months, to be computed from the time of the delivery or service of such notice as aforesaid.

AND ALSO that he the said (mortgagee), his heirs, [executors, administrators,] and assigns, shall and will at any time or times before such sale or sales shall take place as aforesaid, on payment or tender by the said (mortgagor), his heirs, executors, administrators, and assigns, of the said principal sum of 1000*l.* and interest which, at the time of such tender, shall be due and owing to the said (mortgagee), his executors, administrators, and assigns, from the said (mortgagor), his heirs, executors, administrators, and assigns, together with all such costs and expences, as shall have been incurred in the execution of the powers and trusts hereinbefore and hereinafter declared and contained, at the costs and charges of the said (mortgagor), his heirs, executors, administrators, and assigns, re-convey [re-assign] and re-assure the said message or tenement and hereditaments [premises] hereby released [demised and assigned], or otherwise assured or intended so to be, and every part and parcel of the same which shall then remain unsold, with the appurtenances, unto the said (mortgagor), his heirs, [executors, administrators,] and assigns, or unto such person or persons as he or they shall direct or appoint, free from all incumbrances to be made or done by the said (mortgagee), his heirs, [executors, administrators,] and assigns, in the mean time.

AND THE SAID (mortgagor) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said (mortgagee), his executors, administrators, and assigns, that he the said (mortgagor), his heirs, executors, administrators, and assigns, some or one of them, shall and will well and truly pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, the said principal sum of 1000*l.* and interest, after the rate, on the day and time, and in manner hereinbefore mentioned and appointed for payment thereof, according to the true intent and meaning of these presents, and of the proviso or agreement for redemption hereinbefore contained; and in case default shall happen to be made in payment of the said principal sum and interest on the day and time hereinbefore limited and appointed for payment thereof, then that he the said (mortgagor), his heirs, executors, and administrators, shall and will also well and truly pay or cause to be paid unto the said (mortgagee), his executors, administrators, and assigns, all costs, charges, damages, and expences which shall be incurred by him the said (mortgagee), his heirs, [executors, administrators,] and assigns, in the execution of the powers and trusts hereby reposed in him and them, and in enforcing payment of the money to be raised under the sale or sales as aforesaid, or otherwise in relation thereunto, or in relation to the powers and trusts hereinbefore contained. AND ALSO that he the said (mortgagor), his heirs, executors, administrators, and assigns, shall and will, during the continuance of the said sum of 1000*l.* and interest on this security (except only during such period of the said time (if any) as the said (mortgagee), his heirs, [executors, administrators,] or assigns, shall or may be in the actual possession of the said message or tenement and hereditaments [premises], or in receipt of the rents and profits thereof under or by virtue of these presents) well and regularly pay or cause to be paid [all and every the rent and rents, sum and sums of money, in and by the said hereinbefore in part recited indenture of lease or underlease, bearing date on or about the 25th day of June, in the year 1818, reserved and made payable for and in respect of the said premises, and every part thereof, and in like manner pay and discharge, or cause or procure to be paid and discharged] all and all manner of taxes, duties, rates, and assessments whatsoever, which shall or may be assessed, charged, rated, or imposed upon the said message or tenement and hereditaments [premises], or upon any part thereof, or upon or be payable by the said (mortgagee), his heirs, [executors, administrators,] or assigns, for or in respect thereof, or of any part thereof, or on account of the said principal sum of 1000*l.* and interest, by authority of parliament or otherwise howsoever. [AND ALSO well and truly observe, perform, fulfil, and keep, and cause or procure to be well and truly observed, performed, fulfilled, and kept, all and singular the covenants, provisos, clauses, conditions, and

give three
months notice
of sale,

on tender of
money to re-
convey.

Covenant by
mortgagor to
pay money,

and reserved
rents on lease-
holds;

and perform
covenants.

agreements, in the same indenture of lease or underlease contained, and which on the lessee's part and behalf are or ought to be observed, performed, fulfilled, and kept,] And shall and will exonerate, save harmless, and keep indemnified the said (mortgagee), his heirs, [executors, administrators,] and assigns, from and against the same [rents], taxes, and payments, [covenants, provisoes, clauses, and agreements respectively] and all actions, suits, penalties, forfeitures, costs, charges, damages, and lawful demands whatsoever, by reason or on account of, or in relation to the same or any of them respectively. [Here add covenants that the lease is valid, No. 1. pl. 92;

That premises shall remain on trusts.

that the mortgagor has good right to convey or assign, ib. pl. 93. 95.] AND ALSO that from and immediately after the execution of these presents, and until the said principal sum of 1000*l.* and the interest thereof, and all arrears thereof, together with all costs, charges, and expences, incurred in the execution of the powers and trusts aforesaid, and every part and parcel of the same respectively shall be fully paid, satisfied, and discharged the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned] or otherwise assured or intended so to be, with the appurtenances, shall remain, continue, and be vested in the said (mortgagee), his heirs, [executors, administrators,] and assigns, upon the trusts, and to and for the several ends intents and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements in these presents expressed, declared, and contained, of and concerning the same, without any molestation, hindrance, interruption, or denial whatsoever, of, from, or by the said (mortgagor), his heirs, [executors, administrators,] or assigns, or from or by any other person or persons whomsoever. [Add covenants as to freedom from incumbrances, No. 1. pl. 98; and for further assurances, ib. pl. 102; after which insert proviso that mortgagor shall enjoy till default, ib. pl. 104. Then proceed] PROVIDED LASTLY, and it is hereby covenanted, declared, and agreed, by and between the said parties hereto, that immediately from and after default shall be made in payment of the said sum of 1000*l.* and interest, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, and until the said sale or sales shall be made and executed as

After default, and till sale, mortgagee to have option of foreclosing.

aforesaid, the said (mortgagee), his heirs, [executors, administrators,] and assigns, shall and may from time to time, when he and they shall think fit, fully and freely exercise and enjoy his and their right to foreclose the equity of redemption of the said (mortgagor), his heirs, executors, administrators, and assigns, in as full, large, ample, and beneficial a manner, to all intents and purposes as he and they might or could have exercised and enjoyed the same, in case the said power of sale and other powers, trusts, and confidences relating thereto, hereinbefore contained, had not been limited and reserved to the said (mortgagee), his heirs, [executors, administrators,] and assigns, in manner hereinbefore mentioned; but after such sale or sales shall be made and contracts entered into as aforesaid, then this present proviso, and all equity of redemption under the proviso hereinbefore contained, and every other clause, matter, and thing, which tends to lessen or abridge the right and power of the said (mortgagee), his heirs, [executors, administrators,] and assigns, to make an absolute conveyance [assignment] of the said messuage or tenement and hereditaments [premises] hereby released [demised and assigned], or otherwise assured or intended so to be, unto the person or persons who shall agree to become the purchaser or purchasers thereof, free from all incumbrances (except the rents, covenants, conditions, and agreements, which, on the tenant's or lessee's part and behalf, are or ought to be paid, done, observed, performed, fulfilled, and kept) shall cease, determine, and be void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS, &c.

No. VII. § 1.

MORTGAGE BOND.

[Antea, p. 16, of this edition, n. (N).]

KNOW ALL MEN by these presents, that I (mortgagor) of, &c. am held and firmly bound to (mortgagee) of, &c. in the penal sum of 1000*l.* of lawful money current in England, to be paid to the said (mortgagee), his certain attorney, executors, administrators, or assigns, for which payment to be well and truly made, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with my seal, dated the 10th day of September, in the second year of the reign of our Sovereign Lord George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1821.

THE CONDITION of the above written bond or obligation is such, that if the above bounden (mortgagor), his heirs, executors, administrators, or assigns, do and shall well and truly pay or

cause to be paid unto the above named (*mortgagee*), his executors, administrators, and assigns, the full and just sum of 500*l.* of lawful money current in England, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 10th day of March now next ensuing, without any deduction or abatement whatsoever, (being the same sum and interest as is secured or is expressed and intended to be secured to the said (*mortgagee*) his executors, administrators, and assigns, in and by a certain indenture of mortgage bearing even date herewith, and made or expressed to be made between the said (*mortgagor*) of the one part, and the said (*mortgagee*) of the other part); then this obligation to be void and of none effect, otherwise to remain in full force and virtue.

(*Mortgagor*) (L. S.)

Sealed and delivered (being first duly stamped) in the presence of

No. VII. § 2.

CONDITION of Mortgage Bond for floating Balance.

THE CONDITION of the above written bond or obligation is such, that if the above bounden A. B. and C. D., or either of them, or either of their heirs, executors, or administrators, or any of them, do and shall, within three calendar months after demand in writing for that purpose, well and truly pay or cause to be paid unto the said E. F., his executors, administrators, and assigns, such sum or sums of money, (not exceeding in the whole the sum of 2000*l.*) as at the time of such demand shall be due from the said A. B. and C. D. or the survivors of them, his executors or administrators, on or as part of the balance of the account between them, either for principal money or interest, money lent advanced and paid, bills accepted or discounted, commissions or on any other account whatsoever, free and clear of and from all deductions and abatements whatsoever, being the same money as is or is intended to be secured by an indenture, bearing even date with these presents, and made between the said A. B. and C. D. of the one part, and the said E. F. of the other part. THEN, &c.

No. VII. § 3.

CONDITION of Bond to BANKERS to secure floating Balance of Account.

THE CONDITION of the above written bond or obligation is such, that if the above bounden A. B. and C. D., or either of them, or either of their heirs, executors, or administrators, do and shall, on demand thereof in writing to be made by the partner or partners for the time being, carrying on the business of the said bankers E. and Co. under the present or any future partnership, or to the last partner or partners for the time being in the same partnership, or his or their representative or representatives, well and truly pay or cause to be paid unto the partner or partners for the time being in such partnership, such sum or sums of money (not exceeding in the whole the sum of 12,000*l.*) as at the time of such demand shall be due from the said A. B. and C. D., or the survivor of them, his heirs, executors, or administrators, to the partner or partners for the time being, or the last partner or partners in the said banking concern, or his or their executors or administrators, on or as part of the balance of the account between the said A. B. and C. D., or the survivor of them; his heirs, executors, or administrators, and such banking partner or partners, his or their executors, or administrators, either for principal money or interest, or money lent, advanced; bills accepted or discounted, or on any other account whatsoever. THEN, &c.

No. VII. § 4.

WARRANT OF ATTORNEY to confess Judgment.

[*Antea*, p. 5, of this edition, n. (C).]

To A. B., C. D., and E. F., gentlemen, attorneys of his Majesty's Court of Common Pleas at Westminster, jointly and severally, or to any other attorney of the same court.

THESE are to desire and authorize you the attorneys above named, or any one of you, or any other attorney of the court of Common Pleas aforesaid, to appear for me (*mortgagor*), of, &c. in the said court as of Trinity Term last, Michaelmas Term next, or in or as of any other subsequent term, and then and there to receive a declaration for me in an action of debt on a bond,

bearing even date herewith, made and entered into by me the said (*mortgagor*) to (*mortgagee*), of, &c. in the penal sum of 1000*l.* at the suit of the said (*mortgagee*), his executors and administrators, and thereupon to confess the same action, or else to suffer a judgment by *non sum informatus*, or otherwise to pass against me in the same action, and to be thereupon forthwith entered up against me of record of the said court for the said sum of 1000*l.*, besides costs of suit. And I the said (*mortgagor*) do hereby further authorize and empower you the said attorneys, or any of you, after the said judgment shall be entered up as aforesaid, for me, and in my name, and as my act and deed, to sign, seal, and execute a good and sufficient release in the law to the said (*mortgagee*), his heirs, executors, and administrators, of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects and imperfections whatsoever had, made, committed, done, or suffered, in, about, touching, or concerning any writ, warrant, process, declaration, plea, entry, or other proceedings whatsoever, of or any way concerning the same; and for what you the said attorneys, or any of you, shall do or cause to be done in the premises, or any of them, this shall be to you and every of you a sufficient warrant and authority. IN WITNESS whereof, I have hereunto set my hand and seal, the 10th day of September, in the second year of the reign of our Sovereign Lord George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1821.

(*Mortgagor*) (L. S.)

Sealed and delivered (being first duly stamped) in the presence of

Defeazance.

MEMORANDUM, that the above written warrant of attorney is given for securing payment from the above named (*mortgagor*) to the above named (*mortgagee*), of the sum of 500*l.* and interest, according to the condition of the above mentioned bond, being the same sum of 500*l.*, and interest, as are secured or expressed and intended to be secured to the said (*mortgagee*), from the said (*mortgagor*), as well by the said bond, as by a certain indenture of mortgage, bearing even date herewith, and made or expressed to be made between the said (*mortgagor*) of the one part, and the said (*mortgagee*) of the other part: And it is agreed, that no action, execution, or other process or proceeding, shall be commenced, sued out, or prosecuted against the said (*mortgagor*), his heirs, executors, administrators, lands, goods, and chattels, upon the judgment to be entered up in pursuance of the above written warrant of attorney, until default shall happen to be made in payment of the said sum of 500*l.* and interest, contrary to the true intent and meaning of the condition of the said bond, and the proviso for redemption contained in the said indenture of mortgage. As WITNESS our hands the day and year above written.

WITNESS.

(*Mortgagee*)
(*Mortgagor*)

No. VIII.

REFERENCE was made to this number from note (M), antea, p. 16, of this edition, for a proviso and covenant that the money lent should remain on mortgage for a given time. A proviso is inserted, No. I. pl. 80, of this Appendix, and a covenant, *ib.* pl. 105. The following indorsement will have a similar effect:—

MEMORANDUM

That Money shall remain on Security a given Time.

BE IT REMEMBERED, that before the sealing and delivery of the within written indenture, it was agreed by and between the said (*mortgagor*) and (*mortgagee*), that during the term of five years, to be computed from the day of the date of the within written indenture, if the said (*mortgagor*) and (*mortgagee*) shall so long live, the said (*mortgagor*) shall not nor will seek to redeem the premises within mentioned to be assigned, by repayment of the principal money thereby secured, and that the said (*mortgagor*) paying the interest which shall grow due in respect thereof half yearly, during the continuance of the same term determinable as aforesaid, he the said (*mortgagee*) shall not nor will commence or prosecute any action or suit, in order to enforce a redemption thereof, or to obtain payment of the said principal money or to foreclose the said mortgage. As WITNESS the hands of the said parties the day and year first within written.

WITNESS to the signing, A. B.

(*Mortgagor*)
(*Mortgagee*)

No. IX. § 1.

ASSIGNMENT of Book Debts and Money due on Bond belonging to the Mortgagor's Wife, to secure his own Debt.

[Antea, text p. 24, of this edition, n. (F).]

THIS INDENTURE, made, &c.—BETWEEN A. B. of, &c., and D. his wife, (who before her marriage with the said A. B., was the widow and relict of R. S. deceased, late of, &c. and before her marriage with the said R. S. was D. T. spinster,) of the one part, and J. P. of, &c. of the other part. WHEREAS the said R. S., by his last will and testament in writing, bearing date on or about the 4th day of March, in the year 1817, gave and bequeathed unto the said D. B. her executors, administrators, and assigns, one third part or share of his money in the funds, personal estate, effects, and premises, to be paid to her the said D. B. her executors, administrators, and assigns, as soon after his decease as conveniently might or could be: And the said testator of his said will appointed N. O. sole executor. AND WHEREAS [recite testator's death and probate of his will, No. I. pl. 32]. AND WHEREAS the said N. O. collected and got in divers sums of money due to the said testator, and after paying the funeral and testamentary expences, and other debts due and owing by the said deceased, divided the residue thereof into three parts, and paid one third part or share thereof, amounting to the sum of 1334*l.* 17*s.* 6*d.*, unto the said D. B. and there is still due and owing to the said N. O. as such executor as aforesaid, divers other sum and sums of money which constitute the remainder of the residuary estate and effects of the said testator. AND WHEREAS, by a bond or obligation in writing, under the hand and seal of J. K. bearing date on or about the 17th day of April, in the year 1818, the said J. K., became bounden for himself and his heirs to the said D. B. (then D. S. widow) her executors, administrators, and assigns, in the penal sum of 2000*l.*, with a condition thereunder written for making void the same bond or obligation, on payment by the said J. K. his heirs, executors, administrators, and assigns, unto the said D. B. her executors, administrators, and assigns, of the full sum of 1000*l.*, together with interest for the same, after the rate of 5*l.* for every 100*l.*, by the year, on the 17th day of October then next ensuing. AND WHEREAS the said D. B. hath lately intermarried with the said A. B. AND WHEREAS there now remains due and owing to the said A. B., in right of his said wife, the sum of 1000*l.* for principal, and the sum of 50*l.* for interest on the said bond. AND WHEREAS the said A. B. is justly and truly indebted to the said J. P. in the sum of 1500*l.*, as he the said A. B. doth hereby admit and acknowledge, and for better securing the same, the said A. B. and D. his wife, have agreed to assign the said bond or obligation in writing, and all principal money and interest now or henceforth to become due thereon, and all and singular the said one third part or share of the said A. B., in right of his said wife, of and in the said residuary estate, effects, and premises of the said D. R. deceased, which is now due and not collected in, unto the said J. P. his executors, administrators, and assigns, subject nevertheless to the proviso or condition for redemption hereafter contained. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration that the sum of 1050*l.* is still due and owing by the said A. B. to the said J. P. as he the said A. B. doth hereby admit and acknowledge, (testified by his execution of these presents), and also for [a nominal consideration, No. I. pl. 61]; HE the said A. B. and D. his wife, have, and each of them hath bargained, sold, assigned, transferred, and set over, and by these presents do, and each of them DOth, bargain, sell, assign, transfer, and set over unto the said J. P., his executors, administrators, and assigns, ALL THAT the said principal sum of 1000*l.*, due and owing on the said recited bond of the said N. O. as hereinbefore is mentioned, and all interest now due, and henceforth to grow due, for and in respect of the same, TOGETHER with the same bond or obligation, and the full benefit thereof; AND ALSO all that, the said equal third-part or share to which the said A. B. became and is entitled, as hereinbefore is mentioned, of and in the residuary personal estate and effects of the said D. R. deceased, and all the right, &c. [No. I. pl. 74], TO HAVE, HOLD, receive, perceive, take and enjoy, the said sum of 1000*l.*, and interest, and the said equal third part or share, effects and premises, hereby assigned or expressed or intended so to be, unto the said J. P. his executors, administrators, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say [add proviso, that if mortgagor, or his wife, his or her executors, administrators, or assigns, shall pay money, deed to be void, No. I. pl. 77]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree, to and with the said J. P. his executors, administrators and assigns, that [add covenant for payment of money, No. I. pl. 87.]; AND THAT for and notwithstanding any act, deed, matter or thing whatsoever, by him the said A. B. or the said D. his wife, made, done or committed to the contrary, the said bond or obligation hereby assigned or intended so to be, is still subsisting and in force; and that the sum of 1000*l.*, mentioned in the condition thereof, and secured to be paid thereby as hereinbefore recited, is still due and owing to him the said A. B. in right of his said wife; AND THAT for and notwithstanding any such act, deed, matter or

thing as aforesaid, they the said A. B. and D. his wife, or one of them, now have, &c. [good right to assign, No. I. pl. 95]; AND ALSO that he the said A. B., his executors or administrators, shall not, nor will at any time hereafter, receive the said sum of 1000*l.*, or the interest thereof, or the said equal third part or share, and premises, hereby assigned or intended so to be, nor make, do, execute, or knowingly occasion or suffer, any act, deed, matter or thing whatsoever, whereby, or by means or in consequence whereof, the said J. P., his executors, administrators, or assigns, shall or may be prevented, hindered, or interrupted, from receiving, recovering, or enforcing payment of the same principal money and premises, or any part thereof. AND FURTHER, that they the said A. B., and D. his wife, their and each of their executors and administrators, and all and every other person and persons having or claiming, or who shall or may have or claim, any estate, right, title, interest, property, claim or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned or intended so to be, or any of them, or any part thereof respectively, by, from, under, or in trust for him the said A. B., or the said D. his wife, or either of them, their, or either of their executors or administrators, shall and will [make further assurance, No. I. pl. 100]. IN WITNESS, &c.

No. IX. § 2.

MORTGAGE OF LEGACY.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part.—WHEREAS A. B., late of S., in the county of W., deceased, by his last will and testament in writing, bearing date on or about the 1st day of May, in the year 1816, gave and bequeathed (amongst other things) the sum of 1000*l.* to the said (*mortgagor*), his executors, administrators, and assigns, to be paid to the said (*mortgagor*), his executors, administrators, and assigns, within six months after the decease of the said testator's wife Sarah B. (who is still living); and the said A. B. nominated and appointed C. D. and E. F., executors of his said will. AND WHEREAS [recite testator's death, and probate of his will by one of the executors, No. I. pl. 32; and that mortgagor has occasion to borrow, No. I. pl. 4.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [consideration, No. I. pl. 62.]; he the said (*mortgagor*) hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT the said legacy or sum of 1000*l.*, given and bequeathed to the said (*mortgagor*), his executors, administrators, and assigns, by the said hereinbefore in part recited will of the said A. B. deceased, and all benefit and advantage thereof, AND ALL the right, &c. [No. I. pl. 74.] TO HAVE, HOLD, receive, perceive, take, and enjoy the said legacy or sum of 1000*l.* hereinbefore assigned or expressed or intended so to be, and the interest thereof, and every part thereof respectively, unto the said (*mortgagee*), his executors, administrators, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say, [add proviso, No. I. pl. 77; and covenant for payment of money, No. I. pl. 87.] AND the said (*mortgagor*) doth hereby for himself, his heirs, executors, and administrators, further covenant, declare, and agree to and with the said (*mortgagee*), his executors, administrators, and assigns, that he the said (*mortgagor*) hath not at any time or times heretofore received, compounded for, released or discharged the said legacy or sum of 1000*l.* hereby assigned or intended so to be, or any part thereof, nor made, done, or executed any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the same legacy, or any part thereof, now is or hereafter can, shall, or may be impeached, charged, incumbered, or prejudicially affected in any manner howsoever. AND FURTHER that the said (*mortgagor*), his executors and administrators, shall not, nor will, during the continuance of the said sum of 500*l.* on this security, without the express consent and direction of the said (*mortgagee*), his executors, administrators, and assigns, receive, compound, release, discharge, incumber, or prejudice the same; AND ALSO that he the said (*mortgagor*) now hath in himself good right, full power, and lawful and absolute authority to assign the said legacy or sum of 1000*l.* hereby assigned or intended so to be, unto the said (*mortgagee*), his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents. [Add covenant for further assurance, No. I. pl. 100.] IN WITNESS, &c.

No. IX. § 3.

MORTGAGE OF LEGACY, WITH TRUST FOR SALE.

THIS INDENTURE, made, &c. [proceed as in the last precedent, No. IX. § 2. to the habendum, then add] TO HAVE AND TO HOLD the said legacy, sum and sums of money, and all and singular

other the premises hereby assigned, or intended so to be, unto the said (*mortgagee*), his executors, administrators, and assigns, as and for his and their own proper goods and chattels for ever, upon the trusts nevertheless, and to and for the ends intents and purposes hereinafter expressed and declared, of and concerning the same (that is to say), UPON TRUST that if the said (*mortgagor*), his heirs, executors, administrators, or assigns, do and shall, on the 5th day of November now next ensuing, at or in the common dining hall of Lincoln's Inn, London, well and truly pay or cause to be paid unto the said (*mortgagee*), his executors, administrators, and assigns, the sum of 500*l.* of lawful money current in England, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, without any deduction or abatement whatsoever, THEN the said (*mortgagee*), his executors, administrators, and assigns, shall and will re-assign and re-assure the said legacy and premises hereby assigned, or intended so to be, unto the said (*mortgagor*), his executors, administrators, and assigns, or unto such other person or persons as he or they shall direct or appoint, freed from all incumbrances to be made, done, or committed by the said (*mortgagee*), his executors, administrators, and assigns, in the mean time; BUT in case the said (*mortgagor*), his heirs, executors, administrators, and assigns, shall make default in payment of the said sum of 500*l.* and interest; on the days and time hereinbefore appointed for payment of the same; THEN UPON TRUST that he the said (*mortgagee*), his executors, administrators, and assigns, do and shall, and he and they are hereby authorized and required, of his and their own proper authority, without any further consent or concurrence of the said (*mortgagor*), his executors or administrators, to make sale and absolutely dispose of the said legacy or sum of 1000*l.*, and other the premises hereby assigned, for as much money as can then be obtained for the same, and assign and assure the same to the purchaser or purchasers thereof, or as he, she, or they shall direct or require; AND do and shall out of the proceeds of such sale, retain and pay to and for himself and themselves respectively, the said sum of 500*l.* and all interest for the same, which shall remain unpaid, and all costs, charges, and expences of and attending such sale and the execution of the said trusts hereby reposed in him and them, and pay and assign the residue or surplus of the proceeds of the said sale, after such payments and deductions as lastly aforesaid, unto the said (*mortgagor*), his executors, administrators, and assigns, as he and they shall direct or appoint. AND IT IS HEREBY declared that the receipts of the said (*mortgagee*), his executors, administrators, or assigns, shall be good and sufficient discharges, and that the said purchaser or purchasers, his, her, or their executors, administrators, and assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application of his, her, or their purchase money, or any part thereof. [*Add covenants for payment of money, No. I. pl. 87; that legacy is not discharged, No. IX. pl. 2; that mortgagor has good right to assign, No. I. pl. 95; that premises shall remain on trusts, No. VI. p. 1126; and for further assurance, No. I. pl. 102.*] IN WITNESS, &c.

No. IX. § 4.

MORTGAGE OF POLICY OF INSURANCE.

[*This being so ineligible a security by itself, it is seldom resorted to, except by way of collateral security, of which the following is a common form.*]

AND WHEREAS on the treaty for the loan of the said sum of 400*l.* it was agreed, by and between the said parties hereto, that for the more effectually securing the repayment of the same with interest, the said (*mortgagor*) should insure the sum of 500*l.* upon his life (which he has accordingly done), and that the benefit of the said insurance should be assigned to the said (*mortgagee*) in manner hereinafter mentioned. NOW THEREFORE THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said lastly-mentioned agreement, and for the considerations hereinbefore expressed, HE the said (*mortgagor*) hath granted, bargained, sold, assigned, transferred, and set over, and by these presents DOTII grant, bargain, sell, assign, transfer, and set over, unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT deed poll or instrument in writing, purporting to be, and being a policy of insurance, numbered 1467, under the hands and seals of three of the trustees or directors of the Norwich Union Insurance Company, bearing date the 15th day of June, 1816, whereby the sum of 500*l.* is expressed to be assured by the said company upon the life of the said (*mortgagor*), to be paid unto his executors, administrators, or assigns, within three months after satisfactory proof of the death of the said (*mortgagor*) shall have been received by the directors of the said company, in consideration of an annual sum of 54*l.* 8*s.* 6*d.* to be paid by the said (*mortgagor*) during his life: together with all and every sum and sums of money which shall or may at any time be due or recoverable upon or by virtue of the said policy of insurance; and all the right, &c. [No. I. pl. 74.] TO HAVE, HOLD, receive, perceive, take, and enjoy the said deed poll, instrument, policy of insurance, and premises, hereby assigned or intended so to be, together with all and every the sum and sums of money which shall become due upon or by virtue of the same, and all benefit and advantage to be had or derived therefrom unto the said (*mortgagee*), his ex-

executors, administrators, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say, [*Proviso, No. 1. pl. 77, with the following addition to the conclusion*]; AND then also the said (*mortgagee*), his executors, administrators, and assigns, shall and will, at the requests, costs, and charges of the said (*mortgagor*), his executors, administrators, and assigns, assign and effectually assure the said deed poll or policy of insurance, and all benefit and advantage thereof unto the said (*mortgagor*), his executors, administrators, and assigns, or unto such person or persons as he, she, or they shall direct or appoint. [*Add mortgage covenants, and after covenant for further assurances—proceed*] AND THE SAID (*mortgagor*) doth hereby for himself, his heirs, executors, administrators, and assigns, further covenant, promise, and agree, to and with the said (*mortgagee*), his executors and administrators, in manner following, that is to say, that the said (*mortgagor*) shall and will, at his own proper costs and charges, from time to time, well and regularly pay the annual or other payments upon the said policy of insurance hereinbefore assigned or intended so to be, so that the life of the said (*mortgagor*) shall and may be henceforth well and regularly kept insured in the said sum of 500*l.*, at the least, so long as the said principal sum of 400*l.* or the interest thereof, or any part thereof respectively shall remain due and owing to the said (*mortgagee*), his executors, administrators, and assigns, and shall and will at all times when thereunto required by the said (*mortgagee*), his executors, administrators, and assigns, produce and shew unto him or them the receipts or vouchers for the premiums or other sum or sums of money paid for such insurance or insurances; AND IT is hereby declared and agreed, that if the said (*mortgagor*) shall at any time or times hereafter neglect to insure and keep insured the said sum of 500*l.* upon his life as aforesaid, or refuse or decline to produce or shew forth the receipt or receipts, voucher or vouchers, as aforesaid, it shall and may be lawful to and for the said (*mortgagee*), his executors, administrators, and assigns, to effect, or cause or procure to be effected, such insurance or insurances, and to obtain other policy or policies of insurance, either in his or their own name or names, or in the name of him the said (*mortgagor*), and from time to time to keep the life of the said (*mortgagor*) insured; either from year to year, or for any longer period than a year, at his and their discretion. AND IT is hereby also declared and agreed, that the hereditaments and premises hereby demised, and every part thereof, with their appurtenances, as also the said policy of insurance, and the money to be recovered by virtue thereof, shall stand and be charged with, and be a security to the said (*mortgagee*), his executors, administrators, and assigns, for all and every such sum and sums of money, which he the said (*mortgagee*), his executors, administrators, and assigns, shall advance or pay for the purpose or on account of such insurance; together with interest for the same after the rate of 5*l.* for every 100*l.* by the year, and shall not be redeemed or redeemable either at law or in equity, until as well such sum and sums of money which shall be so advanced and paid for or on account of such insurance, together with interest for the same after the rate aforesaid, from the day or days of such payments, as also the said sum of 400*l.* and interest as aforesaid, shall be fully paid, satisfied, and discharged; Provided nevertheless that notwithstanding any thing hereinbefore contained, the premiums and expences to be paid or incurred by the said (*mortgagee*), his executors, administrators, and assigns, for or on account of the said insurance and the interest thereon, shall not be charged on the said messuage tenement or hereditaments policy of insurance and premises, hereby released and assigned, or otherwise assured or intended so to be, to any greater extent than the sum of 100*l.* so as not to exceed, with the said sum of 400*l.*, the sum of 500*l.**; AND the said (*mortgagor*) doth hereby further covenant, promise, and agree, to and with the said (*mortgagee*), his heirs, executors, administrators, and assigns, that so long as the said sum of 400*l.* and interest, or any part thereof shall remain due and unpaid, he the said (*mortgagor*) shall not go beyond seas, nor do or permit to be done any other act, matter, or thing whatsoever, whereby or by means whereof the said hereinbefore in part recited deed poll or policy of insurance, or the assurance thereby made, can or may be vacated, prejudiced, or endangered; AND IT is hereby further declared and agreed, that all and every the sum and sums of money which shall be recovered or received upon or by virtue of the said policy hereby assigned, or other policy or policies of insurance, shall be taken and received by the said (*mortgagee*), his executors, administrators, and assigns, and be by him and them applied (either wholly or in part) in payment and discharge of the said sum of 400*l.* and interest, and such other sum and sums as shall have been paid by the said (*mortgagee*), his executors, administrators, and assigns in or for any such assurances as aforesaid, and the interest which shall or may be due thereon, and all expences incurred by reason thereof; the surplus of such sum or sums of money (if any) to be paid, applied, and disposed of, unto and to the use, or for the benefit and advantage of the said (*mortgagor*), his executors, administrators, and assigns, or as he or they shall direct or appoint. IN WITNESS, &c.

* The exception in the present stamp act extends only to premiums paid by annuitants in assuring the lives of their grantors, which renders the above stipulation, or a 25*l.* stamp necessary. Vide *Scott v. Allsopp*, 2 Pri. 20.

No. IX. § 5.

MORTGAGE of Tolls and Duties settled by Act of Parliament upon Highways, &c.

THIS INDENTURE, made, &c.—BETWEEN A. B., C. D., and others (trustees named and appointed in an act of parliament passed in the 3d year of the reign of his present Majesty, intituled, “An act for repairing the roads from Ferry Bridge to the town of Boston, in the county of Lincoln”), of the one part, and (*mortgagee*), of the other part. WHEREAS sundry tolls and duties are granted by the said act for repairing and keeping in repair the said roads, and the trustees therein named, or any fifteen or more of them, are empowered to take up at interest any sum or sums of money for the more speedy reparation of the said roads, and to assign over the said tolls and duties as a security for the same. AND WHEREAS at a meeting of the said trustees, pursuant to the said act, it was agreed to borrow the sum of 1200*l.* at 4 *per cent.* interest, which the said (*mortgagee*) hath agreed to advance on the credit of the said act of parliament, and the assignment and assurance hereafter contained. NOW THIS INDENTURE WITNESSETH, that for and in consideration of the sum of 1200*l.* in hand paid by the said (*mortgagee*) to the said A. B. as treasurer of the said company of trustees, with the consent and concurrence of the said C. D., &c. testified by their respective executions of these presents, in order and upon trust to pay and satisfy the reasonable charges expended, or to be expended about or by reason of passing the said act of parliament and of these presents, and in trust to apply the residue of the said sum of 1200*l.* in the speedy repairs of the said highways, the receipt of which said sum of 1200*l.* the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said (*mortgagee*), his heirs, executors, administrators, and assigns, and every of them for ever, by these presents; they the said A. B., C. D., and others, have assigned, transferred, and set over, and by these presents do assign, transfer, and set over unto the said (*mortgagee*), his executors, administrators, and assigns, ALL and every the duties and tolls granted or made payable by the said act of parliament, with all the ways, means, powers, and authorities for collecting, raising, and gathering in the same, TO HAVE, HOLD, perceive, and take the same to his and their own use, during the residue of the term of twenty-one years, granted in and by the said act of parliament and now to come and unexpired; PROVIDED ALWAYS that if the said trustees appointed or to be appointed by the said act of parliament for the time being, or any of them, or the receiver or treasurer of the said trustees for the time being, do and shall well and truly pay or cause to be paid to the said (*mortgagee*), his executors, administrators, and assigns, the full and just sum of 1248*l.* of lawful money current in England, in manner following (that is to say), 24*l.* part thereof, on the 8th day of January now next ensuing, and the further sum of 1224*l.* residue thereof, upon the 8th day of July, which will be in the year of our Lord 1823, without any deduction or abatement whatsoever, then this assignment, and every clause, matter, and thing herein contained, shall cease, determine, and be void; AND IT is hereby declared and agreed, by and between all the said parties to these presents, that until default shall be made in payment of the said sum of 1248*l.*, or some part thereof, contrary to the proviso hereinbefore contained, that it shall and may be lawful to and for the said trustees, their treasurer, receiver, or other agents, to receive and take the duties and tolls granted as aforesaid, and to manage and apply the same to the uses intents and purposes in and by the said recited act expressed, directed, and appointed. IN WITNESS, &c.

No. X.

MORTGAGE BY TENANT FOR LIFE.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [*Recite will, giving life estate to mortgagor*, “with divers remainders over, as in the said will is expressed.”] AND WHEREAS the said (*mortgagor*) is now in possession, or in receipt of the rents and profits of the said message or tenement and hereditaments, and having occasion to borrow, &c. [No. I. pl. 4.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [consideration, No. I. pl. 62]; HE the said (*mortgagor*) hath granted, bargained, sold, aliened, released, and confirmed, and by these presents BOTH grant, bargain, sell, alien, release, and confirm, unto the said (*mortgagee*), in his actual possession, &c. [*recite lease for a year*, No. I. pl. 68.] and to his executors, administrators, and assigns, ALL THAT [*insert parcels, general words*, No. I. pl. 70; *reversion*, *ib.* pl. 72; *estate*, *ib.* pl. 73.] TO HAVE AND TO HOLD the said message or tenement, hereditaments, and all and singular other the premises hereby released or otherwise assured or intended so to be, and every part and parcel of the same, with their appurtenances, unto and to the use of the said (*mortgagee*), his executors, ad-

thing as aforesaid, they the said A. B. and D. his wife, or one of them, now have, &c. [good right to assign, No. I. pl. 95]; AND ALSO that he the said A. B., his executors or administrators, shall not, nor will at any time hereafter, receive the said sum of 1000*l.*, or the interest thereof, or the said equal third part or share, and premises, hereby assigned or intended so to be, nor make, do, execute, or knowingly occasion or suffer, any act, deed, matter or thing whatsoever, whereby, or by means or in consequence whereof, the said J. P., his executors, administrators, or assigns, shall or may be prevented, hindered, or interrupted, from receiving, recovering, or enforcing payment of the same principal money and premises, or any part thereof. AND FURTHER, that they the said A. B., and D. his wife, their and each of their executors and administrators, and all and every other person and persons having or claiming, or who shall or may have or claim, any estate, right, title, interest, property, claim or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned or intended so to be, or any of them, or any part thereof respectively, by, from, under, or in trust for him the said A. B., or the said D. his wife, or either of them, their, or either of their executors or administrators, shall and will [make further assurance, No. I. pl. 100]. IN WITNESS, &c.

No. IX. § 2.

MORTGAGE OF LEGACY.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part.—WHEREAS A. B., late of S., in the county of W., deceased, by his last will and testament in writing, bearing date on or about the 1st day of May, in the year 1816, gave and bequeathed (amongst other things) the sum of 1000*l.* to the said (*mortgagor*), his executors, administrators, and assigns, to be paid to the said (*mortgagor*), his executors, administrators, and assigns, within six months after the decease of the said testator's wife Sarah B. (who is still living); and the said A. B. nominated and appointed C. D. and E. F., executors of his said will. AND WHEREAS [recite testator's death, and probate of his will by one of his executors, No. I. pl. 32; and that mortgagor has occasion to borrow, No. I. pl. 4.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [consideration, No. I. pl. 62.]; he the said (*mortgagor*) hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT the said legacy or sum of 1000*l.*, given and bequeathed to the said (*mortgagor*), his executors, administrators, and assigns, by the said hereinbefore in part recited will of the said A. B. deceased, and all benefit and advantage thereof, AND ALL the right, &c. [No. I. pl. 74.] TO HAVE, HOLD, receive, perceive, take, and enjoy the said legacy or sum of 1000*l.* hereinbefore assigned or expressed or intended so to be, and the interest thereof, and every part thereof respectively, unto the said (*mortgagee*), his executors, administrators, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say, [add proviso, No. I. pl. 77; and covenant for payment of money, No. I. pl. 87.] AND the said (*mortgagor*) doth hereby for himself, his heirs, executors, and administrators, further covenant, declare, and agree to and with the said (*mortgagee*), his executors, administrators, and assigns, that he the said (*mortgagor*) hath not at any time or times heretofore received, compounded for, released or discharged the said legacy or sum of 1000*l.* hereby assigned or intended so to be, or any part thereof, nor made, done, or executed any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the same legacy, or any part thereof, now is or hereafter can, shall, or may be impeached, charged, incumbered, or prejudicially affected in any manner howsoever. AND FURTHER that the said (*mortgagor*), his executors and administrators, shall not, nor will, during the continuance of the said sum of 500*l.* on this security, without the express consent and direction of the said (*mortgagee*), his executors, administrators, and assigns, receive, compound, release, discharge, incumber, or prejudice the same; AND ALSO that he the said (*mortgagor*) now hath in himself good right, full power, and lawful and absolute authority to assign the said legacy or sum of 1000*l.* hereby assigned or intended so to be, unto the said (*mortgagee*), his executor, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents. [Add covenant for further assurance, No. I. pl. 100.] IN WITNESS, &c.

No. IX. § 3.

MORTGAGE OF LEGACY, WITH TRUST FOR SALE.

THIS INDENTURE, made, &c. [proceed as in the last precedent, No. IX. § 2. to the habendum, then add] TO HAVE AND TO HOLD the said legacy, sum and sums of money, and all and singular

other the premises hereby assigned, or intended so to be, unto the said (*mortgagee*), his executors, administrators, and assigns, as and for his and their own proper goods and chattels for ever, upon the trusts nevertheless, and to and for the ends intents and purposes hereinafter expressed and declared, of and concerning the same (that is to say), UPON TRUST that if the said (*mortgagor*), his heirs, executors, administrators, or assigns, do and shall, on the 5th day of November now next ensuing, at or in the common dining hall of Lincoln's Inn, London, well and truly pay or cause to be paid unto the said (*mortgagee*), his executors, administrators, and assigns, the sum of 500*l.* of lawful money current in England, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, without any deduction or abatement whatsoever, THEN the said (*mortgagee*), his executors, administrators, and assigns, shall and will re-assign and re-assure the said legacy and premises hereby assigned, or intended so to be, unto the said (*mortgagor*), his executors, administrators, and assigns, or unto such other person or persons as he or they shall direct or appoint, freed from all incumbrances to be made, done, or committed by the said (*mortgagee*), his executors, administrators, and assigns, in the mean time; BUT in case the said (*mortgagor*), his heirs, executors, administrators, and assigns, shall make default in payment of the said sum of 500*l.* and interest; on the days and time hereinbefore appointed for payment of the same; THEN UPON TRUST that he the said (*mortgagee*), his executors, administrators, and assigns, do and shall, and he and they are hereby authorized and required, of his and their own proper authority, without any further consent or concurrence of the said (*mortgagor*), his executors or administrators, to make sale and absolutely dispose of the said legacy or sum of 1000*l.*, and other the premises hereby assigned, for as much money as can then be obtained for the same, and assign and assure the same to the purchaser or purchasers thereof, or as he, she, or they shall direct or require; AND do and shall out of the proceeds of such sale, retain and pay to and for himself and themselves respectively, the said sum of 500*l.* and all interest for the same, which shall remain unpaid, and all costs, charges, and expences of and attending such sale and the execution of the said trusts hereby reposed in him and them, and pay and assign the residue or surplus of the proceeds of the said sale, after such payments and deductions as lastly aforesaid, unto the said (*mortgagor*), his executors, administrators, and assigns, as he and they shall direct or appoint. AND IT IS HEREBY declared that the receipts of the said (*mortgagee*), his executors, administrators, or assigns, shall be good and sufficient discharges, and that the said purchaser or purchasers, his, her, or their executors, administrators, and assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application of his, her, or their purchase money, or any part thereof. [*Add covenants for payment of money, No. I. pl. 87; that legacy is not discharged, No. IX. pl. 2; that mortgagor has good right to assign, No. I. pl. 95; that premises shall remain on trusts, No. VI. p. 1126; and for further assurance, No. I. pl. 102.*] IN WITNESS, &c.

No. IX. § 4.

MORTGAGE OF POLICY OF INSURANCE.

[*This being so ineligible a security by itself, it is seldom resorted to, except by way of collateral security, of which the following is a common form.*]

AND WHEREAS on the treaty for the loan of the said sum of 400*l.* it was agreed, by and between the said parties hereto, that for the more effectually securing the repayment of the same with interest, the said (*mortgagor*) should insure the sum of 500*l.* upon his life (which he has accordingly done), and that the benefit of the said insurance should be assigned to the said (*mortgagee*) in manner hereinafter mentioned. NOW THEREFORE THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said lastly-mentioned agreement, and for the considerations hereinbefore expressed, HE the said (*mortgagor*) hath granted, bargained, sold, assigned, transferred, and set over, and by these presents DOETH grant, bargain, sell, assign, transfer, and set over, unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT deed poll or instrument in writing, purporting to be, and being a policy of insurance, numbered 1467, under the hands and seals of three of the trustees or directors of the Norwich Union Insurance Company, bearing date the 15th day of June, 1816, whereby the sum of 500*l.* is expressed to be assured by the said company upon the life of the said (*mortgagor*), to be paid unto his executors, administrators, or assigns, within three months after satisfactory proof of the death of the said (*mortgagor*) shall have been received by the directors of the said company, in consideration of an annual sum of 54*l.* 8*s.* 6*d.* to be paid by the said (*mortgagor*) during his life: together with all and every sum and sums of money which shall or may at any time be due or recoverable upon or by virtue of the said policy of insurance; and all the right, &c. [No. I. pl. 74.] TO HAVE, HOLD, receive, perceive, take, and enjoy the said deed poll, instrument, policy of insurance, and premises, hereby assigned or intended so to be, together with all and every the sum and sums of money which shall become due upon or by virtue of the same, and all benefit and advantage to be had or derived therefrom unto the said (*mortgagee*), his ex-

executors, administrators, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say, [*Proviso, No. 1, pl. 77, with the following addition to the conclusion*]; AND then also the said (*mortgagee*), his executors, administrators, and assigns, shall and will, at the requests, costs, and charges of the said (*mortgagor*), his executors, administrators, and assigns, assign and effectually assure the said deed poll or policy of insurance, and all benefit and advantage thereof unto the said (*mortgagor*), his executors, administrators, and assigns, or unto such person or persons as he, she, or they shall direct or appoint. [*Add mortgage covenants, and after covenant for further assurances—proceed*] AND THE SAID (*mortgagor*) doth hereby for himself, his heirs, executors, administrators, and assigns, further covenant, promise, and agree, to and with the said (*mortgagee*), his executors and administrators, in manner following, that is to say, that the said (*mortgagor*) shall and will, at his own proper costs and charges, from time to time, well and regularly pay the annual or other payments upon the said policy of insurance hereinbefore assigned or intended so to be, so that the life of the said (*mortgagee*) shall and may be henceforth well and regularly kept insured in the said sum of 500*l.*, at the least, so long as the said principal sum of 400*l.* or the interest thereof, or any part thereof respectively shall remain due and owing to the said (*mortgagee*), his executors, administrators, and assigns, and shall and will at all times when thereunto required by the said (*mortgagee*), his executors, administrators, and assigns, produce and shew unto him or them the receipts or vouchers for the premiums or other sum or sums of money paid for such insurance or insurances; AND IT is hereby declared and agreed, that if the said (*mortgagor*) shall at any time or times hereafter neglect to insure and keep insured the said sum of 500*l.* upon his life as aforesaid, or refuse or decline to produce or shew forth the receipt or receipts, voucher or vouchers, as aforesaid, it shall and may be lawful to and for the said (*mortgagee*), his executors, administrators, and assigns, to effect, or cause or procure to be effected, such insurance or insurances, and to obtain other policy or policies of insurance, either in his or their own name or names, or in the name of him the said (*mortgagor*), and from time to time to keep the life of the said (*mortgagor*) insured; either from year to year, or for any longer period than a year, at his and their discretion. AND IT is hereby also declared and agreed, that the hereditaments and premises hereby demised, and every part thereof, with their appurtenances, as also the said policy of insurance, and the money to be recovered by virtue thereof, shall stand and be charged with, and be a security to the said (*mortgagee*), his executors, administrators, and assigns, for all and every such sum and sums of money, which he the said (*mortgagee*), his executors, administrators, and assigns, shall advance or pay for the purpose or on account of such insurance; together with interest for the same after the rate of 5*l.* for every 100*l.* by the year, and shall not be redeemed or redeemable either at law or in equity, until as well such sum and sums of money which shall be so advanced and paid for or on account of such insurance, together with interest for the same after the rate aforesaid, from the day or days of such payments, as also the said sum of 400*l.* and interest as aforesaid, shall be fully paid, satisfied, and discharged; Provided nevertheless that notwithstanding any thing hereinbefore contained, the premiums and expences to be paid or incurred by the said (*mortgagee*), his executors, administrators, and assigns, for or on account of the said insurance and the interest thereon, shall not be charged on the said message tenement or hereditaments policy of insurance and premises, hereby released and assigned, or otherwise assured or intended so to be, to any greater extent than the sum of 100*l.* so as not to exceed, with the said sum of 400*l.*, the sum of 500*l.**; AND the said (*mortgagor*) doth hereby further covenant, promise, and agree, to and with the said (*mortgagee*), his heirs, executors, administrators, and assigns, that so long as the said sum of 400*l.* and interest, or any part thereof shall remain due and unpaid, he the said (*mortgagor*) shall not go beyond seas, nor do or permit to be done any other act, matter, or thing whatsoever, whereby or by means whereof the said hereinbefore in part recited deed poll or policy of insurance, or the assurance thereby made, can or may be vacated, prejudiced, or endangered; AND IT is hereby further declared and agreed, that all and every the sum and sums of money which shall be recovered or received upon or by virtue of the said policy hereby assigned, or other policy or policies of insurance, shall be taken and received by the said (*mortgagee*), his executors, administrators, and assigns, and be by him and them applied (either wholly or in part) in payment and discharge of the said sum of 400*l.* and interest, and such other sum and sums as shall have been paid by the said (*mortgagee*), his executors, administrators, and assigns in or for any such assurances as aforesaid, and the interest which shall or may be due thereon, and all expences incurred by reason thereof; the surplus of such sum or sums of money (if any) to be paid, applied, and disposed of, unto and to the use, or for the benefit and advantage of the said (*mortgagor*), his executors, administrators, and assigns, or as he or they shall direct or appoint. IN WITNESS, &c.

* The exception in the present stamp act extends only to premiums paid by annuitants in assuring the lives of their grantors, which renders the above stipulation, or a 25*l.* stamp necessary. Vide *Scott v. Allsopp*, 2 Pri. 20.

No. IX. § 5.

MORTGAGE of Tolls and Duties settled by Act of Parliament upon Highways, &c.

THIS INDENTURE, made, &c.—BETWEEN A. B., C. D., and others (trustees named and appointed in an act of parliament passed in the 3d year of the reign of his present Majesty, intitled, “An act for repairing the roads from Ferry Bridge to the town of Boston, in the county of Lincoln”), of the one part, and (*mortgagee*), of the other part. WHEREAS sundry tolls and duties are granted by the said act for repairing and keeping in repair the said roads, and the trustees therein named, or any fifteen or more of them, are empowered to take up at interest any sum or sums of money for the more speedy reparation of the said roads, and to assign over the said tolls and duties as a security for the same. AND WHEREAS at a meeting of the said trustees, pursuant to the said act, it was agreed to borrow the sum of 1200*l.* at 4 per cent. interest, which the said (*mortgagee*) hath agreed to advance on the credit of the said act of parliament, and the assignment and assurance hereafter contained. NOW THIS INDENTURE WITNESSETH, that for and in consideration of the sum of 1200*l.* in hand paid by the said (*mortgagee*) to the said A. B. as treasurer of the said company of trustees, with the consent and concurrence of the said C. D., &c. testified by their respective executions of these presents, in order and upon trust to pay and satisfy the reasonable charges expended, or to be expended about or by reason of passing the said act of parliament and of these presents, and in trust to apply the residue of the said sum of 1200*l.* in the speedy repairs of the said highways, the receipt of which said sum of 1200*l.* the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said (*mortgagee*), his heirs, executors, administrators, and assigns, and every of them for ever, by these presents; they the said A. B., C. D., and others, have assigned, transferred, and set over, and by these presents do assign, transfer, and set over unto the said (*mortgagee*), his executors, administrators, and assigns, ALL and every the duties and tolls granted or made payable by the said act of parliament, with all the ways, means, powers, and authorities for collecting, raising, and gathering in the same. TO HAVE, HOLD, perceive, and take the same to his and their own use, during the residue of the term of twenty-one years, granted in and by the said act of parliament and now to come and unexpired; PROVIDED ALWAYS that if the said trustees appointed or to be appointed by the said act of parliament for the time being, or any of them, or the receiver or treasurer of the said trustees for the time being, do and shall well and truly pay or cause to be paid to the said (*mortgagee*), his executors, administrators, and assigns, the full and just sum of 1248*l.* of lawful money current in England, in manner following (that is to say), 24*l.* part thereof, on the 8th day of January now next ensuing, and the further sum of 1224*l.* residue thereof, upon the 8th day of July, which will be in the year of our Lord 1823, without any deduction or abatement whatsoever, then this assignment, and every clause, matter, and thing herein contained, shall cease, determine, and be void; AND IT IS hereby declared and agreed, by and between all the said parties to these presents, that until default shall be made in payment of the said sum of 1248*l.*, or some part thereof, contrary to the proviso hereinbefore contained, that it shall and may be lawful to and for the said trustees, their treasurer, receiver, or other agents, to receive and take the duties and tolls granted as aforesaid, and to manage and apply the same to the uses intents and purposes in and by the said recited act expressed, directed, and appointed. IN WITNESS, &c.

No. X.

MORTGAGE BY TENANT FOR LIFE.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [*Recite will, giving life estate to mortgagor*, “with divers remainders over, as in the said will is expressed.”] AND WHEREAS the said (*mortgagor*) is now in possession, or in receipt of the rents and profits of the said messuage or tenement and hereditaments, and having occasion to borrow, &c. [No. I. pl. 4.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [consideration, No. I. pl. 62]; HE the said (*mortgagor*) hath granted, bargained, sold, aliened, released, and confirmed, and by these presents DOth grant, bargain, sell, alien, release, and confirm, unto the said (*mortgagee*), in his actual possession, &c. [*recite lease for a year*, No. I. pl. 68.] and to his executors, administrators, and assigns, ALL THAT [*insert parcels, general words*, No. I. pl. 70; *reversion*, ib. pl. 72; *estate*, ib. pl. 73.] TO HAVE AND TO HOLD the said messuage or tenement, hereditaments, and all and singular other the premises hereby released or otherwise assured or intended so to be, and every part and parcel of the same, with their appurtenances, unto and to the use of the said (*mortgagee*), his executors, ad-

No. XVI.

LEASE by Mortgagor and Mortgagee.

[Antea, 177, 5th edit. n. (F).]

THIS INDENTURE tripartite, made, &c.—BETWEEN A. B. of, &c. (mortgagee of the message or tenement and hereditaments hereinafter demised or intended so to be) of the first part, C. D. of, &c. of the second part, and E. F. of, &c. of the third part. WITNESSETH, that for and in consideration of the yearly rent, covenants, conditions, and agreements hereinafter reserved and contained, and which, by and on the part and behalf of the said E. F., his executors, administrators, and assigns, are or ought to be paid, done, performed, fulfilled, and kept, he the said A. B. (at the request, and by the direction and appointment of the said C. D., testified by his being made a party to, and sealing and delivering these presents) hath demised, leased, set, and to farm letten, and by these presents BOTH demise, lease, set, and to farm let; And the said C. D. hath granted, demised, leased, set, and to farm letten, and also ratified and confirmed, and by these presents BOTH grant, demise, lease, set, and to farm let, and also ratify and confirm unto the said E. F., his executors, administrators, and assigns, ALL THAT messuage or tenement, commonly called or known by the name or sign of G. and now in the occupation of the said E. F.; together with all ways, &c. [No. I. pl. 71.] TO HAVE AND TO HOLD the said messuage or tenement and premises hereby demised or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said E. F., his executors, administrators, and assigns, from the feast day of the Annunciation of the Blessed Virgin Mary now last past, for and during, and unto the full end and term of twenty-one years, from thence next ensuing and fully to be complete and ended; YIELDING AND PAYING therefore yearly and every year, during the whole or such part of the term hereby demised, as the said A. B. shall continue mortgagee of the said premises, unto the said A. B., his heirs and assigns, the yearly rent or sum of 30*l.* of lawful money current in England, by four even and equal quarterly payments, as hereinafter mentioned; and after payment of the money due on the said mortgage, YIELDING AND PAYING unto the said C. D., his heirs and assigns, yearly and every year, during the remainder (if any) of the said term hereby demised, the yearly rent or sum of 30*l.*; the said yearly rent or rents to be paid and payable on the four most usual feasts or days of payment of rent in the year (that is to say), on the feast days of St. John the Baptist, St. Michael the Archangel, the Birth of our Lord Christ, and the Annunciation of the Blessed Virgin Mary, by even and equal portions, the first payment thereof to begin and be made on the feast day of St. John the Baptist now next ensuing, clear of land tax, and of all other deductions whatsoever; PROVIDED ALWAYS, and these presents are upon this express condition, that if the said yearly rent or rents hereinbefore reserved, or either of them, or any part thereof, shall be in arrear and unpaid by the space of twenty-one days next after the same ought to be paid as aforesaid (being first lawfully demanded by the said A. B., his heirs and assigns, or by the said C. D., his heirs and assigns), then and in such case, and at all times thereafter, it shall and may be lawful to and for the said A. B., his heirs and assigns, or to and for the said C. D., his heirs and assigns, into and upon the said messuage or tenement and premises hereby demised, or into and upon any part thereof in the name of the whole, wholly to re-enter, and the same to have again, re-possess, and enjoy, as in his and their former estate and condition, any thing herein contained to the contrary thereof in anywise notwithstanding; AND the said E. F. doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said A. B., his heirs and assigns, and also to and with the said C. D., his heirs and assigns, by these presents, in manner following, that is to say, [Add covenant for payment of rent, and other requisite covenants. Insert also a covenant from the mortgagee, that he has not done any act to incumber, No. I. pl. 85.] IN WITNESS, &c.

No. XVII. § 1.

NOTICE to Lessee to pay Rent to Mortgagee.*

[Antea, p. 177, of this edition, n. (F).]

SIR,—Take notice, that by indentures of lease and release, bearing date respectively the 4th and 5th days of May, 1822, the indenture of release being made between (mortgagor) of, &c.

* This notice may be served on the lessee personally, or left at his dwelling-house; in which case delivery to a servant, or some person connected with the lessee, must be proved, so as to induce a reasonable presumption that it reached him. *Doe v. Lucas*, 5 Esp. 153. *Jones v. Marsh*, 4 T. R. 464. *Doe v. Watkins*, 7 lb. 551. *Doe v. Crick*, 5 Esp. 196.

your landlord of the one part, and myself of, &c. of the other part, the message or tenement and premises now in your occupation situate and being in the parish of East Hsley, in the county of Berks, were conveyed and assured to me, my heirs and assigns in mortgage, for securing the re-payment of the sum of 1200*l.* and interest, and which said sum, with a considerable arrear of interest thereon, is still due and unpaid; I do therefore hereby give you notice not to pay any rent now due, or hereafter to become due from you, for the said message or tenement and premises to the said (*mortgagor*), or to any other person or persons on his behalf, but to pay the same rent and arrears of rent to me or my attorney, or to such other person or persons as I shall authorize to receive the same. DATED the 12th day of September, 1824.

Yours, &c.

To (*Lessee*), of, &c.(*Mortgagee*.)

No. XVII. § 2.

NOTICE to Lessee to pay Mortgagee part of Rents in Liquidation of Interest.

SIR,—Take notice, that I am a mortgagee of the premises now in your occupation for the sum of 1200*l.*, due to me from your landlord, and the same is secured to me by an indenture of mortgage, bearing date the 16th day of January, 1818; for which sum there is now due a year's interest, amounting to 60*l.*; I do therefore hereby require you to pay me the sum of 60*l.* out of any rent which may be now due by you to your said landlord, or out of the rent payable by you for the said premises, on the next day of payment of such rent, and so to continue such payments yearly or oftener as your rent becomes due, until further notice from me in that behalf. DATED the 1st day of July, 1820.

Yours, &c.

To (*Lessee*), of, &c.(*Mortgagee*.)

No. XVIII. § 1.

MORTGAGE OF LEASEHOLD PROPERTY.

[Antea, p. 186, of this edition, n. (M).]

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [Recite lease, No. I. pl. 30, and assignments (if any) to *mortgagor*; add *mortgagor's* occasion to borrow, *ib. pl. 4.*] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [consideration, No. I. pl. 62.]; HE the said (*mortgagor*) hath bargained, sold, assigned, transferred, and set over, and also demised, leased, and to farm letten, and by these presents hath bargain, sell, assign, transfer, and set over, and also demise, lease, and to farm let, unto the said (*mortgagee*), his executors, administrators, and assigns, ALL THAT the said message or tenement and premises hereinbefore particularly mentioned and described, and comprised in, and demised by the said hereinbefore in part recited indenture of lease [bearing date on or about the 25th day of June, in the year 1818, for the term of ninety-six years and one half of another year as aforesaid, and assigned to the said T. C., and afterwards by him to the said (*mortgagor*), by the said hereinbefore in part recited indentures of assignment, bearing date respectively on or about the 10th day of December, in the year 1818, and the 26th day of March now last past as aforesaid], together with the same indenture of lease [and also the said indenture of assignment] and all other [assignments] deeds, papers, writings, &c. [No. I. pl. 75.] TO HAVE AND TO HOLD the said message or tenement, and all and singular other the premises hereby assigned and demised, and otherwise assured or intended so to be, and every part and parcel of the same, with their appurtenances (except as in the said indenture of lease bearing date on or about the 22d day of April, 1818] is particularly mentioned and excepted unto the said (*mortgagee*), his executors, administrators, and assigns, from henceforth for and during all the rest, residue, and remainder of the said term or time of ninety-six years and one half of another year, now to come and unexpired therein [upon the trusts nevertheless, and to and for the several ends intents and purposes, and with, under, and subject to the powers, provisos, conditions, declarations, and agreements hereinafter mentioned, expressed, declared, and contained, of and concerning the same], SAVE only and except to the said (*mortgagor*), his executors, administrators, and assigns, the reversion of six days out of the said term or time of ninety-six years and one half of another year, but to hold the said premises for the previous time of the said term, in as full, large, ample, and beneficial a manner as the said (*mortgagor*), his executors, administrators, or assigns, might or could have held and enjoyed the same

if these presents had not been made, and that freed and absolutely discharged, or well and effectually indemnified by him the said (*mortgagor*), his executors or administrators, of, from, and against all and singular the rents, covenants, conditions, and agreements, in and by the said hereinbefore in part recited indenture of lease [bearing date on or about the 25th day of June, in the year 1818] reserved and contained, until the said (*mortgagee*), his executors, administrators, and assigns, shall enter into actual possession by receipt of the rents and profits of the said messuage or tenement and premises hereby assigned and demised, or otherwise assured or intended so to be; BUT to hold the said premises when the said (*mortgagee*), his executors, administrators, and assigns, shall be in the actual possession of the same, subject to the rents, covenants, conditions, and agreements, in and by the said recited indenture of lease reserved and contained, and which on the tenant's or lessee's part and behalf are or ought to be paid, done, observed, performed, fulfilled, and kept; YIELDING AND PAYING therefore yearly and every year during the said term of ninety-six years and one half of another year wanting six days, hereby assigned and demised, unto the said (*mortgagor*), his heirs and assigns, the rent of one pepper corn, if the same shall be lawfully demanded, subject nevertheless to the proviso or agreement for redemption hereinafter contained, that is to say, PROVIDED ALWAYS, and it is hereby declared and agreed. [Add proviso for redemption, No. I. pl. 77. Powers of sale, ante, No. VI.] IN WITNESS, &c.

No. XVIII. § 2.

MORTGAGE OF RENEWABLE LEASEHOLDS.

THIS INDENTURE, &c. [Proceed as in the preceding form, No. XVIII. § 1. to the covenant for further assurances inclusive. Then add the following covenants, that the mortgagor shall renew at the usual times, and assign to the mortgagee, with a proviso, that on his neglect the mortgagee may renew and add fines to principal.] AND FURTHER that they the said (*mortgagors*), their heirs, executors, administrators, and assigns, or some or one of them, shall and will from time to time, as often as it may be usual and customary in that behalf, so long as the said principal sum of 1200*l.* and interest, or any part thereof, shall remain due and unsatisfied, at his and their own proper costs and charges, renew the said hereinbefore in part recited indenture of lease, and take renewed and fresh terms of the said premises, and pay the fines and fees thereby to be incurred, which said renewed terms and interests they the said (*mortgagors*), their executors or administrators, shall within one month next after the same shall be taken and obtained, at his and their like costs and charges, assign over and transfer to the said (*mortgagee*), his executors, administrators, and assigns, for the better and more effectually securing the re-payment of the said principal sum of 1200*l.* and interest, and until such assignment be made and executed, they the said (*mortgagors*), their executors and administrators, shall and will stand and be possessed of, and interested in such renewed term and terms, in trust for the said (*mortgagee*), his executors, administrators, and assigns, for the better securing the re-payment of the said principal sum of 1200*l.* and interest; PROVIDED NEVERTHELESS that in case of the neglect or refusal of the said (*mortgagors*), their executors or administrators, to make such renewals as aforesaid at the usual and stated periods for that purpose, then the said (*mortgagee*), his executors, administrators, and assigns, shall and may be at full liberty to make such renewals, and to pay the fines and fees thereon; which fines and fees so to be paid shall thenceforth be taken and be considered as additional principal money, and shall carry interest at the rate hereinbefore mentioned, and be payable in like manner therewith, and the said premises shall not be redeemed or redeemable until payment shall be made, as well of such additional principal money as of the principal money now advanced, and all arrears of interest then due thereon respectively; PROVIDED ALSO that notwithstanding any thing hereinbefore contained, the fines, fees, and expences, for procuring such new lease or leases, shall not be charged on the said premises hereby assigned or intended so to be, to any greater amount than 29*9*l.**, so as not to exceed, with the said sum of 1200*l.*, the sum of 1449*l.* [Add proviso that mortgagor shall enjoy till default, No. I. pl. 104.] IN WITNESS, &c.

No. XIX. § 1.

CONVEYANCE OF EQUITY OF REDEMPTION from Mortgagor to Mortgagee, by Indentures of Lease and Release.*

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [Recite mortgage, No. I. pl. 21. That default was made in payment, *ib.* pl. 22.

* By the present stamp act, 55 Geo. 3. c. 181, it is declared, that where property is conveyed subject to any mortgage or other debt, or to a sum to be afterwards paid by the

That so much is due, ib. pl. 36. That mortgagee has contracted for the purchase, ib. pl. 13.] Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and for and in [consideration, No. I. pl. 65]; HE the said (mortgagor) hath granted, bargained, sold, aliened, released, and confirmed, and also remised and quitted claim, and by these presents BOTH grant, bargain, sell, alien, release, and confirm, and also remise and quit-claim unto the said (mortgagee) in his actual possession, &c. [Recite lease for a year, No. I. pl. 68,] and to his heirs and assigns, ALL THOSE the said messuages or tenements and hereditaments hereinbefore mentioned and described, and comprised in the said hereinbefore in part recited indentures of mortgage, and thereby released or mentioned and intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. And the reversion, &c. [No. I. pl. 72; estate, ib. pl. 73; deeds, ib. pl. 75]. TO HAVE AND TO HOLD the said messuages or tenements, hereditaments, and all and singular other the premises hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances unto the said (mortgagee), his heirs and assigns, TO THE only proper use and behoof of the said (mortgagee), his heirs and assigns, for ever; TO THE END and intent that the said sum of 3000*l.* and interest may become merged and extinguished in the freehold reversion and inheritance of the said hereditaments; and that the said (mortgagor), his heirs, executors, administrators, and assigns, may be absolutely debarred and foreclosed of and from all right, power, and equity of redemption, under or by virtue or means of the said hereinbefore in part recited indenture of mortgage or otherwise howsoever. [Add qualified covenants for title.] IN WITNESS, &c.

VARIATION

Where the Conveyance is to a Purchaser.

[Recitals and operative part, as above. *Habendum to the purchaser in fee.*] Subject nevertheless to the said hereinbefore in part recited indenture of mortgage, and to the payment of the said principal sum of 3000*l.* due thereon, and to all future and accruing interest which shall become due for and in respect of the same. [Add qualified covenants for title; and a covenant by the purchaser that he will pay mortgage money and indemnify lender, No. I. pl. 108; add also a declaration, that mortgage money shall be paid out of purchaser's personal assets, No. I. pl. 109]. IN WITNESS, &c.

No. XIX. § 2.

RELEASE OF EQUITY OF REDEMPTION ON Mortgage for Years to Mortgagee.

THIS INDENTURE, &c.—[Recite mortgage for years, No. I. pl. 23; default in payment, ib. pl. 22. Money due, ib. pl. 36. Agreement for purchase, ib. pl. 13.] Now, &c. [Consideration, ib. pl. 65.] HE the said (mortgagee) hath granted, remised, released, extinguished, quitted claim, and confirmed, and by these presents BOTH grant, remise, release, extinguish, quit claim, and confirm unto the said (mortgagee), his heirs and assigns for ever, ALL THAT the said messuage or tenement, hereditaments and premises comprised in and demised by the said hereinbefore in part recited indenture of mortgage, or mentioned and intended so to be, and every part and parcel of the same with the appurtenances, together with the same indenture of mortgage, and all other deeds, papers, and writings which he the said (mortgagor) can or may come by, procure, or obtain, without suit at law or in equity; And the reversion, &c. [No. I. pl. 74. And all the estate, &c. ib. pl. 73. *Habendum to mortgagee in fee as in No. XIX. § 1.*] IN WITNESS, &c.

said purchaser, such debt or other sum shall be taken to be a part of the consideration in respect of such *ad valorem* duty (p. 516, quarto ed.); and that deeds or instruments operating as a mortgage, and also as a conveyance of the equity of redemption of the same property, to or in trust for the purchaser, shall be stamped as well with the *ad valorem* duty on mortgages as that on conveyances upon sale, p. 537. *ib.* Therefore, if A. mortgage to B. for 500*l.* and afterwards sells his equity of redemption to C. for 500*l.* more, subject to the mortgage, the conveyance to C. must be impressed separately with a 1*l.* stamp—the duty on a conveyance for 1000*l.*, and with a 4*l.* stamp—the duty on a mortgage for 500*l.*

No. XIX. § 3.

RELEASE OF EQUITY OF REDEMPTION to Mortgagee in Fee by Indorsement.

TO ALL TO WHOM these presents shall come or be shewn, or to whom else it may concern, I (A. B. of, &c.) the within named mortgagor, SEND GREETING :—

WHEREAS the within named (*mortgagee*) hath contracted and agreed with me for the absolute purchase of my right and equity of redemption of, in, and to the within mentioned messuage or tenement and hereditaments, at or for the price or sum of 1600*l*. Now KNOW YE AND THESE PRESENTS WITNESS, that in [*consideration, No. I. pl. 65.*] I do hereby grant, remise, release, extinguish, and quit claim unto the said (*mortgagee*), his heirs and assigns, ALL THAT the proviso or agreement for redemption of the said messuages or tenements and hereditaments within particularly mentioned and contained; and all my estate, right, title, interest, use, trust, property, possession, benefit, and equity of redemption of, in, and to the said messuages or tenements and hereditaments, and every part and parcel thereof with the appurtenances; TO THE END and intent that the said (*mortgagee*) and his heirs, shall and may henceforth and for ever hereafter, peaceably and quietly have, hold, use, occupy, retain, and enjoy the said messuages or tenements and hereditaments with the appurtenances, unto and to the use of the said (*mortgagee*), his heirs and assigns for ever, freed and absolutely discharged of and from the within mentioned proviso or agreement for redemption, and all other right, power, and equity of redemption of me the said A. B. of, in, and to the same messuages or tenements and hereditaments whatsoever. And I do hereby covenant, promise, and agree, &c. [*Add covenants, that mortgagor has good right to release, free from incumbrances and for further assurances.*] IN WITNESS, &c.

No. XX.

SECOND MORTGAGE.*

[*Antea, p. 261, of this edition, n. (N), and 541, ib. n. (N).*]

THIS INDENTURE, of three parts, made, &c.—BETWEEN (*mortgagor*) of the first part, (*second mortgagee*) of the second part, and (*first mortgagee*) of the third part. [*Recite securities to first mortgagee, and that the sum of 2000*l*. is still due, No. I. pl. 36. That mortgagor has occasion to borrow further sum which second mortgagee has agreed to lend on security after mentioned, ib. pl. 45. Then proceed as in an ordinary mortgage in fee, No. II. § 1. adding general covenants, and excepting in the covenant against incumbrances, the first mortgage. The habendum should be subject and without prejudice to the first mortgage. After the proviso that the mortgagor shall enjoy till default, add the following covenant by the first mortgagee.*] AND THE SAID (*first mortgagee*) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said (*second mortgagee*), his heirs, executors, administrators, and assigns, in manner following (*that is to say*): That he the said (*first mortgagee*) his heirs, executors, and administrators, shall not nor will at any time or times during the continuance of the said sum of 500*l*. and interest on this security, assign or transfer his or their hereinbefore in part recited security or securities for the said sum of 2000*l*. and interest, or convey or assure the said messuages or tenements and hereditaments hereby released, or otherwise assured or intended so to be, to any person or persons whomsoever, without first giving to the said (*second mortgagee*), his heirs, executors, and administrators, two months notice in writing under his or their hand or hands so that he the said (*second mortgagee*), his executors, administrators, and assigns, shall and may have the first option of taking a transfer or assignment of the said security or securities on payment to the said (*first mortgagee*), his executors, administrators, or assigns, of the said principal sum of 2000*l*. and interest which shall be then due and owing thereon; and that he the said (*first mortgagee*) shall not nor will assign or transfer the said security or securities, or convey or assure the said messuage or tenement and hereditaments, or any part thereof, to any person or persons whomsoever, until the expiration of the said two months notice, or until the said (*second mortgagee*), his heirs, executors, administrators, or assigns, shall have refused or declined to take a transfer or assignment of the said security or securities within that time. [*Add covenant by first mortgagee to produce deeds, including his own securities, to second mortgagee.*] IN WITNESS, &c.

* If two persons are about to advance money at the same time on one estate, and it be the wish of the parties that neither should have preference to the other, one moiety of the estate may be limited to one mortgagee for a term of years, with remainder to the other mortgagee in fee, and the other moiety limited to the other mortgagee in a similar manner.

No. XXI.

[Antea, p. 261, of this edition, n. (N).]

A THIRD MORTGAGE cannot be recommended without securing a pre-emption of the first incumbrance, as in the preceding form, No. XX. But this cannot be effected if the third mortgagee, at the time of advancing his money, has notice of the intervening security. A third mortgage may, of course, be made in the usual way as of a legal estate, but in that case the mortgagee must run the risk of purchasing in the first legal incumbrance, which indeed the incumbrancer may be prevented from selling by a previous engagement with the mesne mortgagee.

No. XXII.

ASSIGNMENT OF JUDGMENT in Trust for better securing Mortgage Money, and afterwards to attend the Inheritance.*

[Antea, p. 275, of this edition, n. (O).]

THIS INDENTURE, made, &c.—BETWEEN (*assignor*) of the first part, (*mortgagor*) of the second part, (*mortgagee*) of the third part, and (*trustee*) of the fourth part. WHEREAS a judgment was obtained as of Hilary Term, in the first year of the reign of his present Majesty, in the court of Common Pleas, against the said (*mortgagor*), in an action of debt upon bond at the suit of the said (*assignor*), for the sum of 150*l.* and costs of suit, and which said judgment was duly entered up on record in the said court, as by reference to the records of the same court will more fully appear. AND WHEREAS the said sum of 1500*l.* hath since been fully paid and satisfied, as he the said (*assignor*) doth hereby admit and acknowledge, testified by his execution of these presents. AND WHEREAS the said (*mortgagor*) hath lately borrowed of the said (*mortgagee*), the sum of 1000*l.* on the security of certain lands and hereditaments, situate at T. in the county of B., and by indentures of lease and release, the lease bearing date the day before, and the release bearing or intended to bear even date with these presents, and made, &c. [*Recite mortgage, No. I. pl. 21.*] AND WHEREAS upon the treaty for the said loan it was agreed, that the said judgment should be assigned to the said (*trustee*) in trust as hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for [a nominal consideration, No. I. pl. 61]; HE the said (*assignor*), at the request and by the direction and appointment of the said (*mortgagor*), and on the nomination of the said (*mortgagee*) (testified by their respectively executing these presents), hath bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over; and the said (*mortgagor*) for the considerations, in the said indenture of release mentioned, and at the request and on the nomination of the said (*mortgagee*) testified as aforesaid, hath bargained, sold, assigned, ratified, and confirmed, and by these presents DOTH bargain, sell, assign, ratify, and confirm unto the said (*trustee*), his executors, administrators, and assigns, ALL THAT the said hereinbefore in part recited judgment, and all and every sum and sums of money whatsoever now

* The following are extracts from the opinions of two eminent conveyancers on the subject of assigning satisfied judgments.—“There are cases in the books which say, that a satisfied judgment may be assigned to protect, and it is not unfrequent in practice to meet with the assignment of satisfied judgments to protect; but the whole of this is error, for these judgments can be no protection, because a judgment itself gives no right still the extending of the lands by execution; and by the rules of the common law courts there can be no execution on a satisfied judgment. All these errors must have crept in from the chancery men not having adverted to the practice of the common law courts, but having acted on the analogy which they supposed to exist between an outstanding satisfied term and an outstanding satisfied judgment; but these things are quite dissimilar, for a term is an actual legal estate, but a judgment is nothing more than a mere election till execution, and by the rules of the courts there can be no execution on a satisfied judgment. If then, with regard to the pending purchase, the vendor can prove that any judgments are satisfied, my opinion is, that on investigation of the point before the court, the purchaser could not make the existence of the satisfied judgment an objection though satisfaction be not entered up; but the practice is to require, on the part of a purchaser, satisfaction to be entered up on all judgments.” J. P.

“Assignments of judgments are taken not after they are satisfied, but after a purchaser has entitled himself by his advances to stand in the place of judgment creditors, and the practice of taking assignments of judgments ought not to be condemned or discouraged.” R. P.

due thereon, or which hereafter shall or may grow or become due by virtue of the same, or upon any execution to be sued out thereupon, and all benefit and advantage whatsoever to be received or derived therefrom; and all the estate, &c. [No. I. pl. 74.] TO HAVE AND TO HOLD the said judgment, and other the premises hereby assigned or mentioned or intended so to be, unto the said (trustee), his executors, administrators, and assigns, IN TRUST, nevertheless, in the first place for securing to the said (mortgagee), his executors, administrators, and assigns, the repayment of the said sum of 1000*l*. and the interest thereof, according to the true intent and meaning of the said hereinbefore in part recited indenture of mortgage bearing even date with these presents, and to be assigned and disposed of from time to time as he or they shall direct or appoint, and after payment and satisfaction of the said sum of 1000*l*. and in the mean time subject thereto; IN TRUST for the said (mortgagor), his heirs and assigns, TO THE END that the same judgment and premises shall and may attend and wait upon the inheritance of the lands and hereditaments in or by the said in part recited indenture of mortgage granted and released or intended so to be, in order to protect the same from and against all mesne and subsequent incumbrances, if any such there are or may be. [Covenant by the assignor that he has not incumbered, No. I. pl. 85.] IN WITNESS, &c.

No. XXIII.

APPOINTMENT OF RECEIVER.*

[Antea, p. 294, of this edition, n. (E).]

THIS INDENTURE, made, &c.—BETWEEN (mortgagor) of the first part, (mortgagee) of the second part, and (receiver) of the third part. [Recite mortgage, No. I. pl. 21.] AND WHEREAS upon the treaty for the loan of the said sum of 2500*l*. it was proposed between the said (mortgagor) and (mortgagee), that for the punctual and regular payment of the interest thereof, as it should become due, a receiver should from time to time be appointed for collecting and receiving the rents and profits of the said lands and hereditaments comprised in the said hereinbefore in part recited indenture of mortgage; and that the said (receiver) should be the first receiver thereof. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for securing the punctual and regular payment of the interest of the said sum of 2500*l*. from time to time, as the same shall become due, he the said (mortgagee) and also the said (mortgagor), at the nomination and by and with the consent and approbation of the said (mortgagee), testified by his executing these presents, have, and each of them hath made, nominated, constituted, and appointed, and by these presents do and each of them DOETH make, nominate, constitute, and appoint the said (receiver), their receiver, agent, and attorney, from time to time to collect and receive all and every the rents, issues, and profits of the said messuages or tenements and hereditaments so mortgaged to the said (mortgagee) as aforesaid, of and from the several and respective tenants and occupiers thereof, when and as the same shall from henceforth become due and payable; and upon payment thereof or any part thereof, to make, sign, and give acquittances and discharges for the same; and in case of non-payment thereof, or of any part thereof, to take such lawful remedies by action, suit, distress, or otherwise, for recovery of the same, as shall be requisite and necessary in that behalf, and to do, perform, and execute all other matters, and things needful and necessary for collecting, receiving, and getting in the same rents, issues and profits, and every part thereof. AND it is hereby declared

* This appointment should be effected by a separate instrument, as it is requisite the receiver should be in possession of his authority, which he cannot be, if the appointment be contained in the mortgage assurance. Every delegation should be by deed, Co. Litt. 52, a. but it is not necessary that it should be by indenture, nor that the receiver should be a party to the deed, 2 Roll's Abr. pl. 12. Shep. Touch. 217, but he is usually made a party to shew his acquiescence in the appointment. As the receiver is a trustee for the mortgagee, it seems reasonable that the mortgagee should name the individual. The receiver may be any person, even a trustee of the estate; for the parties may appoint who they please. The receiver may give acquittances, but he cannot pursue any remedy for recovery of the rent, without an express authority; Pitt v. Snowden, 3 Atk. 750; in which case he should sue in the name of his principal, Coombe's Ca. 9 Co. 76 b; 1 Roll. Abr. 330. F. 1. Frontin v. Small, 2 Stra. 705. S. C. 2 Ld. Raym. 1418. but if he sue in his own name, there will not, it seems, be any objection. Parker v. Kett, 1 Salk. 95. A receiver cannot apply the money in his hands for any other purposes, than to answer the ends of his appointment, unless empowered so to do, or it be necessary for the preservation of the estate, Blunt v. Clitherow, 6 Ves. 799. Attorney-General v. Vigor, 11 Ib. 563. Waters v. Taylor, 15. Ib. 26; nor can he delegate his authority to a third person unless by consent of his principal, 1 Roll. Abr. 330. E. 1; Coombe's Ca. 9 Co. 76 a.] Parker v. Kett, 1 Salk. 95.

and agreed, by and between the said parties to these presents, that all and every the rents, issues, and profits which shall be received by the said (receiver) in pursuance of these presents, shall be applied and disposed of upon the trusts, and to and for the ends, intents and purposes hereinafter mentioned and declared, (that is to say) UPON TRUST, that the said (receiver) do and shall from time to time, in the first place, pay and satisfy unto the said (mortgagor), his executors, administrators, and assigns, all interest which from time to time shall grow due for or in respect of the said sum of £500l., or any part thereof, at such times and in such manner as in and by the said recited indenture are mentioned and appointed for that purpose; and do and shall in the next place, render and pay over unto the said (mortgagor), his heirs and assigns, or such other person or persons as shall be entitled thereto, all the clear residue of the rents, issues, and profits of the said premises so to be collected and received as aforesaid, over and above what shall from time to time be paid and applied in satisfaction of such interest as aforesaid, and the usual and necessary charges and expences of him the said (receiver), in collecting, receiving, paying, or remitting such rents, issues, and profits as aforesaid. AND THE SAID (receiver) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said (mortgagee), his executors, administrators, and assigns, and also to and with the said (mortgagor), his heirs and assigns, and to and with each and every of them in manner following, that is to say, that he the said (receiver) shall and will at or upon the request of the said (mortgagee), his executors, administrators, and assigns, from time to time, so long as the said sum of £500l. shall continue charged on the said messuages or tenements and hereditaments, and as he the said (receiver) shall continue collector and receiver of the rents, issues, and profits of the same hereditaments, or of any part thereof, use his utmost endeavours faithfully to collect and get in the said rents, issues and profits. AND FURTHER, that he the said (receiver) shall duly and punctually pay and apply, or cause or procure to be paid and applied, upon the trusts and to and for the ends, intents, and purposes aforesaid, all such sum and sums of money as shall from time to time be received and collected by him the said (receiver) or any other person or persons by his appointment. AND THE SAID (mortgagor) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, grant, and agree, to and with the said (mortgagee), his executors, administrators, and assigns, by these presents in manner and form following, that is to say, that he the said (mortgagor), his heirs or assigns, shall not nor will, at any time hereafter, without the consent of the said (mortgagee), his executors, administrators, or assigns, first had and obtained for that purpose in writing under his and their hands and seals, revoke, alter, or make void the powers and authorities hereby given to the said (receiver), or do, commit, or suffer, or cause to be done, committed, or suffered, any act, matter or thing, whereby the powers and authorities hereby given, or any of them, may become void, or the said (receiver), or any future receiver to be appointed as hereinafter is mentioned, may be obstructed or interrupted in, or prevented from collecting and receiving or recovering the rents, issues, and profits of the said messuages or tenements and hereditaments, upon the trusts and for the purposes aforesaid, during such time as the said sum of £500l., or any part thereof, or any interest for the same, or any part thereof, shall be owing and unpaid. AND FURTHER, that if the said (receiver) should happen to die or be rendered incapable of collecting and receiving the rents, issues, and profits of the said messuages, tenements, and hereditaments, or shall refuse or neglect to act or proceed therein in manner aforesaid, during such time as the said principal sum of £500l., or any part thereof, or any interest for the same, or any part thereof, shall be owing and unpaid, or shall otherwise misbehave himself in relation to the trusts hereby in him reposed, then and in any of the said cases, he the said (mortgagor), his heirs and assigns, shall and will join and concur with the said (mortgagee), his executors, administrators, and assigns, in removing the said (receiver) from the said office or employment, and in constituting and appointing some other fit person or persons to receive, collect, and manage the rents, issues, and profits of the said messuages or tenements and hereditaments, upon the trusts aforesaid, and so from time to time as often as any of the like cases shall happen, until the said principal sum of £500l., and all interest for the same shall be fully paid and satisfied. AND FURTHER, that in case the said (mortgagor), his heirs and assigns, shall neglect or refuse in any of the cases before mentioned, to join with the said (mortgagee), his executors, administrators, or assigns, in constituting or appointing some other fit person or persons to receive and collect the rents, issues, and profits aforesaid, or any part thereof, that then and in such case from time to time as often as it shall so happen, it shall and may be lawful to and for the said (mortgagee), his executors, administrators, and assigns, without the concurrence of the said (mortgagor), his heirs or assigns, to constitute and appoint some fit person or persons to collect and receive the said rents, issues, and profits upon the trusts and for the purposes aforesaid. AND IT IS hereby declared and agreed by and between all the said parties to these presents, and particularly the said (mortgagor), doth hereby declare and agree, that the said (mortgagee), his executors, administrators and assigns, shall not be charged or chargeable with or be accountable for any loss or misapplication of the rents, issues, and profits arising or to be received from and out of the said messuages or tenements and hereditaments, or any part

* This clause appears not to be absolutely necessary; as, in the case of a mortgage, a power of attorney is irrevocable, see ante, p. 1048 of this edition. 2 Esp. 565. 7 Ves. 28.

thereof, by reason or means of any neglect, default, or breach of trust in the said (receiver) or any future collector or receiver of the same rents, issues, and profits, or by any other means or occasion whatsoever; but that such loss and misapplication shall be wholly sustained and made good by the said (mortgagor), his heirs, executors, administrators, and assigns. AND IT IS hereby further declared and agreed by all the said parties to these presents, that the said (receiver) shall only be answerable and accountable for such sums and sums of money as he shall actually receive, or as shall come to his hands in pursuance of these presents. AND ALSO that it shall and may be lawful to and for the said (receiver), so long as he shall continue collector and receiver of the said rents, issues, and profits, after payment unto the said (mortgagee), his executors, administrators and assigns, of all interest that shall grow due to him or them in respect of the said sum of 2500*l.* as aforesaid, to retain and take to his own use all such costs, charges, and expences, as he shall necessarily sustain or be put unto in collecting or receiving the rents, issues, and profits of the said messuages or tenements and hereditaments, and in executing, doing, and performing the several other trusts, matters, and things hereinbefore contained as aforesaid. PROVIDED ALWAYS, and it is hereby further declared and agreed, by and between the said (mortgagor) and (mortgagee), that in case there shall not at any time hereafter, during the continuance of the said sum of 2500*l.* and interest, or any part thereof, on this security, be six months' interest in arrear or unpaid to the said (mortgagee), his executors, administrators, or assigns, that then, and in such case, it shall and may be lawful to and may be lawful to and for the said (mortgagor), or such person or persons as he shall from time to time authorize and appoint to collect and receive the rents, issues, and profits of the said messuages or tenements and hereditaments, without the lawful let, suit, trouble, interruption, disturbance, claim, or demand of the said (receiver) or such future or other person or persons as shall, in pursuance of the said provisos or covenants hereinbefore contained, be appointed by the said (mortgagee) and the said (mortgagor), their respective heirs, executors, administrators, and assigns, to receive the said rents for the intents and purposes hereinbefore mentioned, it being the true intent and meaning of the said (mortgagee) and (mortgagor) respectively, that the said (receiver), and every future receiver so to be appointed as aforesaid, shall only from time to time enter upon the said messuages or tenements and hereditaments, and receive the rents, issues, and profits thereof, when and so often as six months interest shall be in arrear and unpaid to the said (mortgagee), his executors, administrators, and assigns, for or in respect of the said sum of 2500*l.*; or so much thereof as shall remain due and owing to him and them upon or by virtue of this present security.

The following Attornment is sometimes added to this Deed where the Mortgagor is in Possession of any Part of the Premises.

AND for the better and more effectually recovering the interest of the said sum of 2500*l.* in manner aforesaid, by and out of the rents, issues, and profits of the said messuages or tenements and hereditaments, or so much and such part or parts thereof as are now in the occupation of the said (mortgagor); HE the said (mortgagor) doth hereby attorn and become tenant to the said (mortgagee), his heirs and assigns, of the same premises, at the yearly rent of 150*l.* to be paid half yearly, that is to say, on the 21st day of June, and the 21st day of December in every year, during so long time as the said sum of 2500*l.*, or any part thereof, shall remain secured upon the same hereditaments; But subject, nevertheless, to the proviso lastly hereinbefore contained, prohibiting the receiving or collecting in of the said rents, issues, and profits by the said (receiver), unless six months interest shall be in arrear and unpaid to the said (mortgagee), his heirs, executors, administrators, and assigns. IN WITNESS, &c.

No. XXIV. § 1.

[*Antea*, p. 317, of this edition, n. (T).]

WHEN a tenant in tail pays off an incumbrance, and is desirous that the estate should continue subject to the charge, the best and most usual mode is to take an assignment of the incumbrance in the name of a trustee, with a declaration by indorsement signed by the trustee, that "the within sum of 1000*l.* mentioned to be paid by the said (trustee) to the within named (assignor), was the proper money of the within named (tenant in tail), and that the name of the said (trustee) was used in the within deed, IN TRUST only for the said (tenant in tail) his executors, administrators, and assigns."

No. XXIV. § 2.

DECLARATION of Trust of Mortgage Money.

THIS INDENTURE, made, &c.—BETWEEN (the trustee) of the one part, and A. B. (cestui que trust) of the other part. [*Recite mortgage*, No. I. pl. 21]. AND WHEREAS the said sum of

4000*l.* was the proper money of the said A. B. Now THIS INDENTURE WITNESSETH, that he the said (*trustee*) doth hereby acknowledge and declare that the said sum of 4000*l.*, which in and by the said hereinbefore in part recited indenture was expressed to have been paid by him to the said (*mortgagor*), was and is the proper money of the said A. B. and that the name of him the said (*trustee*) was made use of in the said indenture, and in the bond or obligation of even date therewith and therein referred to, IN TRUST only and to and for the sole use and benefit of the said A. B., his heirs, executors, administrators, and assigns, and to, for, and upon no other use, trust, end, intent, or purpose whatsoever. AND the said (*trustee*) doth hereby for himself, his heirs, executors, and administrators, covenant, promise, declare, and agree, to and with the said A. B. his executors, administrators, and assigns, that he the said (*trustee*), his heirs and assigns, shall and will from henceforth, and at all times hereafter stand and be seised of and interested in the messuages or tenements and hereditaments comprised in and conveyed and assured by the said indenture or intended so to be, and every part thereof, IN TRUST for the said A. B., his executors, administrators, and assigns. AND ALSO that he the said (*trustee*), his heirs, executors, or administrators, shall not nor will at any time hereafter, without the consent in writing of the said A. B. assign, transfer, or otherwise vacate the said recited indenture of mortgage, nor release the monies thereby secured until the said A. B. shall be fully paid and satisfied the said sum of 4000*l.* and the interest thereof, in manner in the same indenture expressed, nor do or cause to be done, or willingly or knowingly permit or suffer any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said hereditaments or any of them, or the said sum of 4000*l.* and the interest thereof or any part thereof, shall or may be impeached, charged, incumbered, or prejudicially affected in any manner howsoever. AND FURTHER, that he the said (*trustee*), his heirs, executors, and administrators, shall and will at all times hereafter, upon the reasonable request and at the costs and charges in the law of the said A. B. convey and assure all and singular the said messuages or tenements, and hereditaments, comprised in the said recited indenture of mortgage, with their and every of their appurtenances, unto, to the use of, or in trust for the said A. B., his heirs and assigns, or unto such other person or persons as he or they shall, in writing under his or their hand and seal, or respective hands and seals, direct or appoint, freed and absolutely discharged of and from all and all manner of liens, charges, and incumbrances whatsoever, to be made, done, committed, occasioned, permitted or suffered by the said (*trustee*), his heirs or assigns, in the mean time. IN WITNESS, &c.

No. XXV.

WELSH MORTGAGE.*

[Antea, p. 373, of this edition, n. (E).]

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. WITNESSETH, that in consideration of the sum of 300*l.* advanced and lent by the said (*mortgagee*) to the said (*mortgagor*), the receipt, &c. [No. I. pl. 62; demise for a term of fifty years, No. VII. § 1.] IN TRUST that he the said (*mortgagee*), his executors, administrators, and assigns, do and shall, from time to time, by and out of the rents, issues, and profits of the messuages or tenements and hereditaments hereby demised, or intended so to be, (after deducting all taxes and outgoings upon or in respect of the same), in the first place retain and reimburse, to and for himself and themselves respectively, all costs, charges, damages, and expences, which he or they shall or may from time to time expend, bear, sustain, or pay, in or about receiving or recovering the said rents, issues, and profits, or any part thereof, or otherwise, in the execution of the trusts hereby in him and them reposed, and also in insuring the said erections and buildings hereby demised from loss or damage by fire, if he or they shall think proper, and after payment thereof, do and shall yearly and every year, during the continuance of the said sum of 300*l.* on this security, retain and satisfy unto and for himself and themselves respectively, interest on the said sum of 300*l.* or such part thereof as shall from time to time remain unliquidated, after the rate of 5*l.* for every 100*l.* by the year, free from all deductions and abatements whatsoever; and in the next place, do and shall yearly apply the residue or surplus of the said rents, issues, and profits, in or towards payment and discharge of so much of the said principal sum of 300*l.* as the same will from time to time extend to pay, until the whole of the said sum of 300*l.* and the interest thereof, shall be thereby or otherwise fully paid and discharged; and from and after full payment and satisfaction thereof, it is hereby declared and agreed that the said term of fifty years shall cease, determine, and be void to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS, &c.

* The deed prepared from this precedent should be deposited in the hands of a third person in trust for both parties.

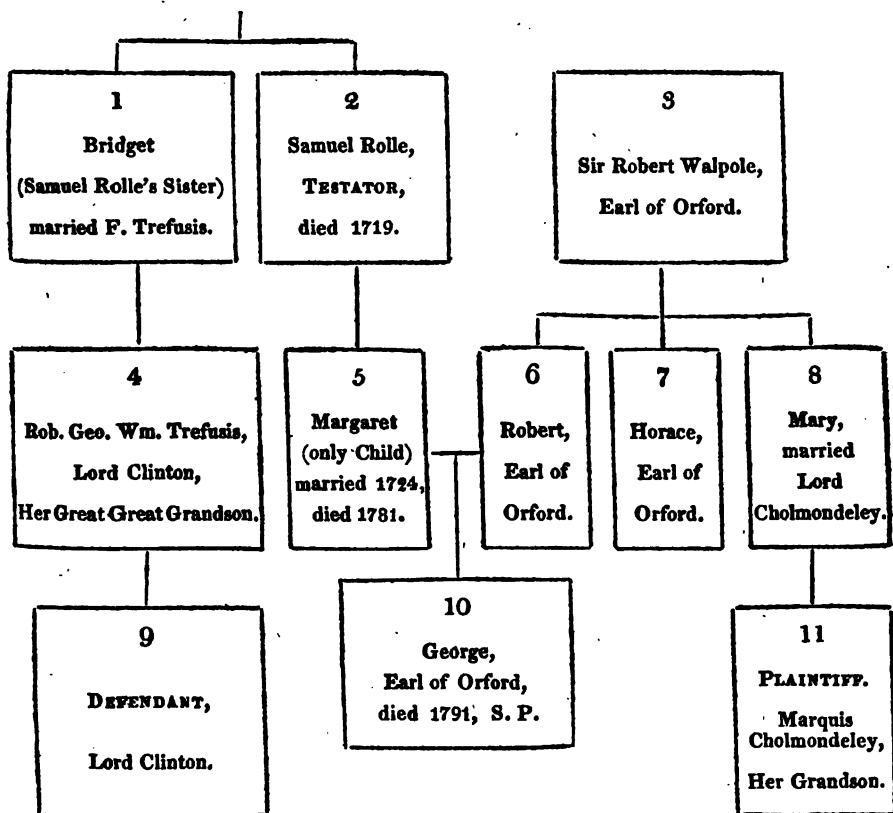
No. XXVI. § 1.

CHOLMONDELEY v. CLINTON.

Abridged from 12 Ves. 48. Coop. 80. 2 Meriv. 81. Ib. 173. Sug. Pow. 639, 2d edit. 2 Barn. & Ald. 625, and 2 Jac. & Walk. 1.

[*Antea*, p. 388, of this edition, in notis.]

PEDIGREE.



In the year 1781, George Earl of Orford, (No. 10) being seised to him and his heirs (by descent from his mother Margaret, the only daughter of Samuel Rolle) of three estates in the counties of Dorset, Devon, and Cornwall, by a voluntary settlement, dated August, 1781, after reciting, "that he was desirous that the hereditaments thereafter mentioned, should continue and remain in the family and blood of the said Samuel Rolle," conveyed and assured the premises in the counties of Devon and Cornwall (the estates in dispute), to the use of himself for life, with remainder to the heirs of his body; and for want of such issue, to the use of such person as he should appoint, and in default of appointment "to the use of the right heirs of the said Samuel Rolle for ever." The deed contained a general power to the said Earl, of revoking the uses therein specified, and of limiting new uses of the same hereditaments. In September of the same year, Earl Orford settled his Dorset estate to such uses as he should appoint, and for want of appointment, to the use of Mrs. Tuck for life, with remainder to the use of Horatio Walpole for life, with remainder to the

*Circumstances
of case.*

use of Horatio Walpole's first and other sons in tail male, with remainder to his daughters in tail, with remainder to the use of the right heirs of the said Samuel Rolle for ever, with powers of revocation and new appointment to him the said Earl. Four years afterwards Lord George borrowed 20,000*l.* of Sir Edward Hughes, and in 1783, (without noticing the previous settlements) conveyed the estates in Dorset, Devon, and Cornwall, to Sir E. Hughes in fee, subject to redemption on payment of 20,000*l.* and interest, by the said Lord Orford, in which case Sir E. Hughes agreed to re-convey, &c. Lord Orford died in 1791, without issue, and without appointment; whereupon the equity of redemption in the Dorset estate descended to Horatio Walpole, under the settlement of September, 1781, and the equity of redemption in the two other estates descended to Robert George William Trefusis, Lord Clinton, (No. 4) as the right heir of the said S. Rolle, under the settlement of August in the same year. Lord Clinton entered into possession of the Devon and Cornwall estates, and in 1792 conveyed them to trustees and their heirs, upon trust, to raise by sale or mortgage a sum of 44,000*l.* to pay off a mortgage of 7000*l.* upon other estates of Lord Clinton, and upon other trusts specified in a deed of even date; and subject thereto, to the use of Lord Clinton for life, with remainder to his first and other sons in tail, with remainders over.

The trustees in this settlement being about to raise money as directed by the deed, a question arose whether the mortgage to Sir E. Hughes of 1785, operated as a total, or only as a partial revocation of the several deeds of August and September, 1781—if they operated as a total revocation of these settlements, then the descents of the equity of redemption which had taken

place could not be supported, and the estates devolved on Horace Earl of Oxford, (No. 7) as the uncle and heir at law of George Earl of Orford, (No. 10). This question was settled to the satisfaction of the parties, and, as it is conceived, on sound principles of equity, (see *n. (E)*, ante, of this ed. p. 111,) by the opinions of Sir A. Macdonald and Mr. Shadwell. The following is a copy of the latter gentleman's observations:—"The intention of the deeds of 1785, being merely to transfer an incumbrance, which had existed for near sixty years, to a new mortgagee, and there being no notice taken of the settlements of 1781, nor any recital of the late Earl's desire of vesting the fee-simple in himself in opposition to the uses of the settlements, I am of opinion that in equity those uses are not revoked, and that, subject to the mortgage (which, if not dischargeable out of other funds, will fall proportionably upon both settled estates), the equity of redemption will go according to the limitations in the respective settlements.—*Lancelot Shadwell*, Lincoln's-Inn, January, 1792." Sir A. Macdonald was of the same opinion. In consequence of which Earl Horace relinquished the point, and by deeds of confirmation, dated April, 1794, conveyed the said estates in Devon and Cornwall to such and the same uses as were limited and declared by the deed of 1792, in corroboration thereof to all intents and purposes as if the mortgage of 1785 had not been executed. The title of the trustees being thus fortified, Sir Lawrence Palk advanced them the sum of 44,000*l.* taking from them a mortgage in fee, the redemption of which was reserved to the trustees. Lord Clinton afterwards died, and the estates in question devolved on his son, the present defendant, (No. 9).

In 1805 Sir L. Palk filed his bill against Lord Clinton and others, praying an account of what was due on the mortgage of 20,000*l.* (which by the will and death of Sir E. Hughes had devolved on Lady Hughes); also an account of

what was due to him the plaintiff under his own mortgage; and that the trustees under the deed of 1792 might be decreed to sell so much of the estates comprised in that trust, as would be sufficient to pay the sums that might be found due on both securities. The plaintiff, however, during the arguments, consented that so much of the bill as prayed a sale for the purpose of raising the 20,000*l.*, should be dismissed; admitting, that the trustees had no power to raise that sum; and as to the other sum, the Master of the Rolls was of opinion that the plaintiff had no right to call upon the trustees to sell, in order to pay even that sum. The plaintiff was no object of the trust, farther than as that trust enabled the trustees to make him a good mortgage. When he had that, he was in the ordinary situation of a mortgagee. He had all the remedies, but only the remedies of a mortgagee; and his Honour thought it very doubtful whether the trustees could make any sale, after they had raised the money by mortgage. The plaintiff then requested permission to redeem the first mortgage, to which it was objected that sufficient parties were not before the court; and his Honour was of opinion that there was a clear necessity of having Mr. Walpole before him, as well as Lord Clinton. Liberty was then desired to amend generally; but here again the Master of the Rolls was against the plaintiff; for he saw great force in the objection, that a cause could not be recast and shaped differently from what it originally stood. That indeed would lead to great litigation. Parties would draw their bills with very little caution; knowing they might alter them. But as the plaintiffs counsel had expressed their readiness to take such order as the court would grant, his Honour allowed the plaintiff to amend generally, by adding parties; and to pray a redemption or foreclosure in the alternative, or such other relief as he might be advised. 12 Ves. 66.

Defect in title communicated to plaintiff.

Nothing further is mentioned of this case in the books, probably on account of some arrangement which shortly after took place between Lord Clinton and Sir L. Palk, as to the payment of his mortgage by a transfer of the same to a new lender; preparatory to which (as the editor has understood) it was considered necessary by Lord Clinton's solicitors (Messrs. Seymour and Montrion) to lay an abstract

of the title before counsel. An abstract was accordingly forwarded to Mr. Preston, who suggested the propriety of immediately levying a fine to obviate by non-claim an objection, which it was possible a mortgagee might be advised to raise, on the ground that by the limitation to the right heirs of Samuel Rolle, in the settlement of 1781, Horace Earl of Orford became, on the death of George Earl of Orford, absolutely entitled to the equity of redemption of the said estates in preference to Robert George William Lord Clinton; for that Earl George was himself the right heir of Samuel Rolle at the date of the settlement, and being in possession, the ultimate reversion vested in him, from whom it descended as from the person last seized to Earl Horace, as his heir at law, and that Earl Horace, by his deed of confirmation, had not prevented this objection, since that deed was made merely to remove any doubt which might have arisen from the mortgage being construed to be a total revocation of the voluntary settlement. A fine was levied, and the present Lord Clinton further fortified his title by obtaining the legal estate from the first mortgagee, who, in consideration of £9,000*l.*, conveyed the same to Francis Drake, his heirs and assigns, by indentures dated November, 1811, in which deed was contained a declaration that the sum of £9,000*l.*, so paid, was the proper monies of the said Lord Clinton, and that the name of the said Francis Drake was used only as a trustee for him.

Early in 1812 (before five years non-claim on the fine had elapsed) the plaintiff (No. 11), as heir at law of Horace Earl of Orford, made his claim to the estates in question, and filed his bill in June of the same year against Lord Clinton, Sir Lawrence Palk, and others, for recovery of the Devon and Cornwall estates, which were of the estimated value of several hundred thousand pounds. It appeared by an affidavit of Lord Clinton (Coop. 81.), that he had been informed by Lord Cholmondeley himself, that he (Lord Cholmondeley) had received information from an anonymous person relative to Lord Clinton's estates, in consequence of which Lord Cholmondeley had commenced the present suit. Report says, that the secret was disclosed to Lord Cholmondeley at a masquerade by a person disguised in a domino, and idle rumour, assisted by the affidavit of Mr. Seymour (after a dissolution of partnership between him and Mr. Montrou, Coop. 81.), has not failed to fix on the person of the anonymous communicant. The bill was filed in 1812 by the Marquis of Cholmondeley and the Honorable Mrs. Damer, to whom Earl Horace had by will, dated subsequently to the death of Earl George, devised the residue of his real and personal property, and prayed a redemption and re-conveyance to the plaintiffs of Hughes's mortgage, which had been assigned to Drake, and that Lord Clinton might be decreed to deliver up to them the possession of the premises, and the defendant Seymour to assign to them, or as they should direct, an outstanding term of 200 years then vested in him, in trust to attend the inheritance, together with an account of rents and profits, received by Lord Clinton; and that he might be decreed to pay the amount of what should be found due in taking such account, upon being allowed all sums paid by him in reduction of interest on the mortgage. The prayer as to the account was afterwards limited to the last six years.

Lord Clinton by his answer submitted, that it was the intention both of Earl George, when he executed the settlement of 1781, and of Earl Horace, when he executed the deed of confirmation of 1794, that the estates should become vested in the family of Samuel Rolle; that the defendant and his father had been in undisturbed possession of the estates for upwards of twenty years, the plaintiff at the same time being under no disability; he therefore claimed the benefit of such length of possession, and of the statutes, as if he had pleaded them. Drake and the two surviving trustees, under the settlement of 1792, prayed indemnity, and Sir Lawrence denied notice, submitting, that if Lord Clinton's title was not absolutely indefeasible, the plaintiff ought not to be permitted to impeach his title as mortgagee, he being a purchaser for valuable consideration without notice. After putting in his answer Sir L. Palk died, whereupon the suit was revived against his representatives. The case was argued at great length, and sustained with immense labour and ability by Leach, Roupell, Shadwell, and Sugden, for the plaintiffs, and by Sir Samuel Romilly, Bell, Heald, Preston, Benyon, Blake, Hart, Horne, and Loupley, for the defendants. Three points were made, 1st, the effect of the limitation to the right heirs of Samuel Rolle in the deeds of 1781; 2d, the effect of the deed of confirmation of 1794; and 3d, the effect of length of time.

I. It is true that courts ought to expound deeds as well as wills, according to the intention of the maker. But it has never been said, that a court is to frame or alter a deed, as may best effectuate the maker's intention. The party is left to execute his own purpose in his own way. As the words of this limitation stand, they are descriptive of the person (whoever he may be) that was, at the time of the execution of the deed, the heir of Samuel Rolle. Supposing we were to read this limitation without knowing who that person was, all would agree that the then existing right heir would take a vested remainder. When it is found that Lord Orford (the settlor) himself is the right heir, do the words therefore change their meaning? No; but they are unskilfully employed, and will not effectuate the purpose which the framer of the instrument had in contemplation. The court is desired to say, that there is in this deed (when properly construed) a limitation to such persons as should be the right heirs of Samuel Rolle at the time when the preceding limitations should expire. The deed itself does not furnish the least evidence of an intention so to frame the limitation. There is nothing executory in it; nothing which gives the court a power to

Bill.

Answer.

Sir W. Grant's judgment.

modify the means by which the grantor himself proposed to arrive at his end. The deed too is purely voluntary. There is no contract which can entitle any person to say, that if the words of the deed go beyond, or fall short of, the intended purpose, it ought to be so construed, or so reformed, as to place the parties in the situation in which, by their bargain, they were intended to stand. *Upon the whole of this part of the case, I am of opinion that Lord Clinton took no estate under the deed of 1781.*

II. As to the effect of the deed of confirmation of 1794, the rule is laid down in *Braybrooke v. Inskipp*, 8 Ves. 417, that where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to the title, he will not be bound by it, as to any interest of which he has not been apprised. But if he consents to join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have enquired into the nature of those objections, and cannot afterwards raise a question as to the extent of his information. Now it is clear that the deed of confirmation, in the present instance, was neither applied for nor obtained with any view to the purpose to which it is now endeavoured to convert it.

III. It seems to me that there is no room, in this case, for the operation of the statute of limitations. Even at law it is not mere possession that is sufficient to bar the claim of the true owner. *There must be something tantamount to a disseisin.* Now, though there may be what is deemed a seisin of an equitable estate, there can be no disseisin of it, first, because the disseisin must be of the entire estate, and not of a limited and partial interest in it, and the equitable ownership cannot possibly be the subject of disseisin; and, secondly, because a tortious act can never be the foundation of an equitable title. An equitable title may, undoubtedly, be barred by length of time; but it cannot be shifted or transferred. What was once my equity, may, by my laches, be wholly extinguished; but it cannot, without my act, become the equity of another person. It does not therefore follow, *that an equity can be acquired by length of possession, because by length of possession it may be barred.* If it did, Lord Hardwicke's position in *Hopkins v. Hopkins*, 1 Atk. 581, would no longer be true; for disseisin, abatement, or intrusion, would then be available modes of acquiring equitable estates. A mortgagee may assume the possession whenever he pleases, and therefore a mortgagor is called a tenant at will to the mortgagee, and in point of possession he is so even in equity; for a court of equity never interferes to prevent the mortgagee from assuming the possession. Lord Clinton, therefore, when he acknowledged the title of the mortgagee, had nothing but a precarious and permissive possession, which, however long it might have endured, could never ripen into a title against any body; for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended. I am of opinion that the person who has the equity of redemption in the present case is the plaintiff, Mrs. Damer, as the devisee of Horace Earl of Orford; for as there could be no disseisin of an equitable estate, there was nothing to prevent him from devising this interest, and the general words of his will are sufficient to include it.

As to Sir Lawrence Palk he has lent money on what turns out to be a bad title. Where is the obligation upon the right owner to give him a good one. Lord Orford could not be said to acquiesce in acts which he did not know he had any right to dispute; and therefore all that has been said about acquiescence, either on the part of Lord Clinton, or Sir Lawrence Palk, seems to be irrelevant, in a case where all parties were under the influence of the same common mistake. There is no principle, therefore, on which I can hold that Sir Lawrence Palk's mortgage is a good charge on the equity of redemption. 2 Meriv. 362.

Case and certificate from court of law. The first of the above questions being a mere legal question, a case was sent to the Court of King's Bench. The Judges differing in opinion returned the following certificates:—"This case has been argued before us by counsel; and considering that the words 'the right heirs of Samuel Rolle' are words of plain and well known import, and, according to that import, must denote George Earl of Orford, the settlor, we think that Robert George William Trefusis, afterwards Lord Clinton, took no estate under the said indenture of the 2d August, 1781."—C. Abbott, G. S. Holroyd, W. D. Best. "This case has been twice argued; and considering that it appears by the indenture of 2d August, 1781, that the said George Earl of Orford knew himself to be the then heir of Samuel Rolle; considering also that during the life of the said George Earl of Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of Samuel Rolle but the said George Earl of Orford and his issue, who were of the united line of Walpole and Rolle, and were all provided for by the estate tail created by that indenture; considering also that it appears plainly by that indenture, that the said George Earl of Orford meant to provide for the separate line of Rolle; that no person of that separate line could come within the description of right heir of Samuel Rolle, till the united line should be exhausted; and that a limitation, by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created: I am of opinion that the effect of the indenture of 2d August, 1781, was to vest in the said George Earl of Orford an estate in tail general, with remainder (if he should make no appointment) to such person as, at the expiration of that estate tail, should be right heir of Samuel Rolle in fee; and consequently that the said Robert George William Trefusis took an estate in fee under the said indenture." J. Bayley. 2 Barn. & Ald. 642.

On the 10th March, 1820, the cause was again revived on the equity reserved. Sir Thomas Plumer, M. R. entered fully into the merits of the case, and in the course of an elaborate and convincing judgment, made the following observations:—The primary object of enquiry in construing deeds as well as wills is the intention of the party; where that is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference. Now, to suppose in the present case that Lord Orford meant to give the remainder to himself, is an argument that amounts to a *reductio ad absurdum*. It would suppose Lord Orford to have entertained, at the same moment, intentions on the same points, directly opposite to and incompatible with each other. When the limitation is intended to apply to Lord Orford, he is mentioned by his proper name and title, "George Earl of Orford." Why should there have been this change in the description, if the same person were throughout intended? Again, how are we, on this hypothesis; to account for the powers of appointment and revocation specially reserved to Lord Orford, in the limitations preceding and following the limitation in question. I feel therefore strongly inclined to concur with Mr. Justice Bayley in his opinion of the deed of 1781.

Sir T. Plumer's judgment.

The objections which have been taken on the part of the defendants, may be reduced to four heads; 1st, As to the want of proper parties as defendants to the suit; 2dly, As to the frame and nature of the bill and the relief prayed; 3dly, As to the effect of the deed of confirmation of 1794; and 4thly, As to the effect of length of time.

First, the defendants insist that all the persons eventually interested in the estate under the settlement made by the late Lord Clinton in the year 1792, ought to have been made defendants. I think this objection is not well founded. It is sufficient to have brought before the court the trustees of [qu. and] the person in *esse* entitled to the first vested estate of inheritance. Those who have contingent interests are not necessary parties. Lord Hardwicke in *Hopkins v. Hopkins*, states the established rule on this point. "If (says he) there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not in *esse*, unless there be fraud and collusion between the trustees, and the first person in whom a remainder of inheritance is vested," 1 Atk. 590. But the objection that the person who is entitled to the Dorset estate, ought to have been a party, is, I think, better founded. The estates in all the three counties of Dorset, Devon, and Cornwall, are equally subject to, and comprehended in one and the same mortgage, and must therefore all be redeemed together. *The owner of part of the estate in mortgage cannot separately redeem his part.* The mortgagee is entitled to insist, that the whole of the mortgaged estate shall be redeemed together; and for this purpose, that all the persons interested in the several parts of the estate as mortgagors, should be made parties to the bill seeking the account and the redemption. A mortgaged estate sold in twenty lots, might otherwise be made the subject of twenty different bills for redemption, with all the consequences upon the account and the re-conveyance. The bill is also defective in not having made the personal representative of the late Lord Clinton a party, who is stated in the bill to have been some time in possession of the rents and profits; and to have paid the interest and part of the principal of the first mortgage.

As to the second head, I think the bill should have been by Mrs. Damer alone; for it is not true, as the bill states, that upon the death of Horace Earl of Orford, "your orator and oratrix became entitled to the same."

The third head we pass by, and hasten to the

Fourth and last objection, which calls for a separate, immediate, and unequivocal determination. Mrs. Damer, the devisee, is on all sides admitted to be the only person who could have any claim of title under Horace Earl of Orford to this estate; and the full period of twenty years having elapsed since the death of George Earl of Orford, when that title, if at all, first accrued, the remedy would have been taken away by the statute in consequence of the laches and non-claim. The lapse of twenty years affords a substantive insuperable plea in bar. It is the fixed limit to the remedy—the *tempus constitutum*. One day beyond is as much too late as one hundred years. This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud. No plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, if the merits could be enquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title. The door of justice is closed. The claimant cannot be heard to shew his title. It is a decisive answer to him that he comes too late. That alone is the bar. His title remains, but he has lost his remedy. The time having begun to run against Horace Earl of Orford, must continue to run on against those claimants under him. Then as to the mortgage; so long as the incumbrance continues, the interest must be paid by whoever is the owner of the estate, as much as the taxes or any other out-going. Payment thereof is an admission of the debt, and is in itself the strongest exercise of adverse possession. It is a public usurpation of the character of a mortgagor from year to year doing the acts which belong to it. The statute of limitations applies by analogy to equitable claims. This is fully proved by numerous cases, in particular, by those of *Bond v. Hopkins*,

1 Sch. & Lef. 429, *Hovendon v. Annesley*, 2 ib. 630, and *Medlicott v. O'Donnell*, 1 Ball & Be. 164, in which latter case Lord Chancellor Manners thus expresses himself:—"I think then I stand well supported by principle and authority in saying, that the court is bound to regulate its proceedings by analogy or in obedience to the statute of limitations. Upon the uniform concurrence of a long train of the highest authorities, I can entertain no doubt in the present case. It is clear, that had it been the claim of a legal estate in a court of law, the remedy would have been barred by the statute of limitations. It is therefore clear, that being an equitable estate, the remedy must, by analogy, be equally barred in a court of equity."

Here I might close the argument, but in deference to the high authority by which a contrary conclusion has been formed, I shall proceed to examine the grounds and principles on which it is founded.—That the bar from length of time and non-claim never can affect an estate so long as it is covered by a mortgage, is a proposition now for the first time advanced. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature. The possession of the mortgagor, or the person claiming that character, is not adverse to the mortgagee, because it is consistent with his title. The mortgagee is, therefore, not barred by any length of that possession; but the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title. Against him, therefore, it will operate as a bar, if acquiesced in beyond the limited period. Payment of the interest of the mortgage by the mortgagor, or the person claiming to be mortgagor, to the mortgagee, is a recognition of the right and title of the mortgagee, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of a directly contrary import. By making the payment in his own name, and on his own account, he takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself. It would be a perversion of inference to convert an act, done for the purpose of the assumption of the character exclusively to himself, into an admission of its belonging to another.

It is said, that the mortgagee is a trustee for the mortgagor, that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually an admission of the title of the other. This seems founded on a mistaken notion of the resemblance between the characters of trustee and mortgagee. The mortgagee when he takes possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest, by the person claiming to be the mortgagor, is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor. He does not at any time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy to the statute of limitations.

The mortgagee is a mere indifferent stake-holder. The real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off: when paid off, the mortgage title ends; and then, and not before, the implied trust to surrender the estate to the person entitled to demand it, begins. Payment of the interest operates between Lord Clinton and the mortgagee, to keep alive the mortgage debt. It is a continued mutual recognition of his title as mortgagor and that of the person to whom the payment is made as mortgagee. But it has no effect beyond this, or with respect to any other person, except as it tends to exclude the title of any other person to either character. Actual possession by the mortgagee might have had a different effect, because that would have been consistent with Mrs. Damer's title, and not adverse to it. And yet even if this actual possession of the mortgagee had continued for twenty years, without any payment of interest by the mortgagor, or any thing done or said during that period, to recognise the existence of the mortgage, or to acknowledge it, on the part of the mortgagee, it would clearly operate as a bar to redemption by the mortgagor. And such is the prevalence of analogy in equity, that even under circumstances of poverty and distress, the possession of the mortgagee for twenty years, without a recognition of the mortgage title, or any account kept upon the footing of it, becomes a subject of equitable bar to redemption. In the present case, possession is taken adversely under no contract expressed or implied, by a stranger, between whom and the person wrongfully kept out of possession, there is no privity or engagement of any kind, who is under no obligation to render any account, whose possession is, from the first, inconsistent with, and therefore, adverse to the title of the rightful mortgagor. Surely, upon every principle of reason and equity, the same analogy to the statute of limitations which prevails in the one case, must *à fortiori* prevail in the other. It is upon this ground alone, and I am anxious it should be distinctly so under-

stood, without resting upon any of the other points in the cause, that I think, this bill should be dismissed.

The bill was dismissed accordingly, but without costs, 2 Jac. & Walk. 189.

The decree dismissing the bill having been enrolled, the plaintiffs appealed to the House of Lords. The Lord Chancellor, in moving the judgment of the House, stated his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as dissection, abatement, or intrusion, with respect to legal estates; and that for the quiet and peace of titles and the world, it ought to have the same effect.—Lord Redesdale was clearly of opinion that the plaintiffs were barred by the effect of the statute of limitations, and that the bill should therefore be dismissed. On the 15th June, 1821, judgment was accordingly given, affirming the decree at the Rolls in favour of the defendant Lord Clinton.

*Bill dismissed
and decrees con-
firmed in Dom.
Proc.*

CHRISTOPHER v. SPARKE.—On the statute of limitations three late cases remain to be noticed. The first, *Christopher v. Sparke*, 2 Jac. & Walk. 223, where A., B., and C., on a dissolution of partnership, referred certain matters in dispute to arbitrators, who awarded a sum of 1832*l.* to be due from A. and B. to C.—B. gave security for his moiety of the debt by a mortgage, dated May, 1795, which contained trusts for sale in case of default. C. died in 1802, having, by will, given all his real and personal estate to the plaintiff (who was one of the arbitrators), upon trusts for the benefit of his wife and children. The bill was filed in November, 1815, against the heir at law of B. who stated, in his answer, that the award was surreptitiously obtained by the non-production of a certain book, wherein it would have appeared that the balance was against the mortgagee instead of in his favour; that B. had sold the premises to a *bond fide* purchaser in 1788, who, had ever since been in possession; that twenty years had elapsed since the date of the mortgage without payment of interest, acknowledgment, or demand; and that there was nothing to repel the presumption of payment arising from length of time. It was also contended, that though the mortgage contained a trust to sell, still the case could not be stated higher than that of a bill of foreclosure, which, after twenty years without demand, and without payment of interest, could not be sustained, (*Trask v. White*, 3 Bro. C. C. 289); for that notwithstanding what was said in *Toplis v. Baker*, 2 Cox, 118, the principle of presumption was considered to apply as well to mortgages as to bonds. *Blewitt v. Thomas*, 2 Ves. jun. 669. *Mead v. Earl of Bandon*, 2 Dow. P. C. 268. The Master of the Rolls said, there were two ways in which length of time might operate in cases like this, when it was not a positive bar by virtue of the statute, viz. by raising a presumption, either that the debt demanded never was due, or that it had been paid. It was in the former mode, that it operated here. The only proof was the award; the question was, whether that created any debt; and, surely the non-claim for twenty years, when the parties were in the way, and there was every opportunity for asserting the demand, was strong evidence against its existence. As to the case of *Trask v. White*, which had been cited, where Lord Thurlow thought that twenty years, without payment of interest or demand, created a presumption that the debt was satisfied, Sir Thomas Plumer had always understood it to be a principle, that when the twenty years have run upon a bond debt, without any thing to break the time, or any circumstance to account for it, that presumption did arise, but not operating as a positive statutory bar, it might be met by evidence, and by circumstances introduced to explain it. In the present case, the plaintiff's title failed by the absence of all proof on which it depended, and by the strong presumption against him, arising from the evidence of long possession. The bill was consequently dismissed, with costs.

*Mortgage debt
presumed satis-
fied after twen-
ty years, with-
out payment of
interest, ac-
knowledgegment,
or demand,
and no differ-
ence from mort-
gage being in
trust to sell.*

DOE v. REED.—The second case is that of *Doe v. Reed*, 5 Barn. & Ald. 237, on the following circumstances: In the year 1747, C. (under whom the plaintiff claimed,) being indebted to R., gave him a judgment, and put him in possession of the rents and profits of the estates in question, until the debt, amounting to 850*l.* should be satisfied thereout. R. remained in possession until 1752, when he assigned over to the defendant's ancestor all the debt then remaining due and his right of possession to the estates. Under this assignment, the defendants entered into possession, and continued such possession up to 1801, in which year a bill was filed in Chancery by C.'s family to recover possession. The case was sent to a jury, who were told by the Judge (Bayley) that the question for them to consider was, whether, under the circumstances, they could bring their minds to believe that a conveyance from C. or his son to the defendant's family had actually taken place. On the suggestion, that during the marriages of C. the father and son, no conveyance could have been made without levying a fine, which being of record, might have been produced, if it had existed, the jury found a verdict for the lessor of the plaintiff. Hullock, Serjt. now moved for a new trial on the ground of misdirection. Lord C. J. Abbott was clearly of opinion, that the direction was according to law; for that the original possession was accounted for, and was consistent with the fact of there having been no conveyance. It might indeed, have

*Conveyance
not presumed
after fifty-
three years,
grantee having
been let into
possession as
Welsh mort-
gagee.*

continued longer than was consistent with the original condition, but it was surely a question for the jury to say, whether that continuance was to be attributed to a want of care and attention on the part of C.'s family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, the Lord Chief Justice thought it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance. The point presented to the Jury was the correct one. In his Lordship's opinion, presumptions of grants and conveyances had already gone to too great a length, and he was not disposed to extend them further. Bayley and Holroyd, Js., being of the same opinion, the motion for a new trial was refused. 5 Barn. & Ald. 237.

Mortgagor in possession thirty-seven years, interest presumed paid all that time, if nothing to contradict it. HALL v. DOE.—The third and last case is that of *Hall v. Doe*, 1 Dowling & Ryland, 340, and 5 Barn. & Ald. 687, where in a special verdict it was found, that a mortgage had been made with the usual proviso for re-conveyance on non-payment of the principal at a given day, and a covenant that the mortgagor should enjoy till default. The special verdict also found, that the principal money was not paid at the day, but that the mortgagor continued in possession, and that he and his heirs had been in possession for a period of thirty-seven years. There was no finding by the jury either that interest had or had not been paid by the mortgagor; and the court said, that upon this finding it must be taken that the occupation was by permission of the mortgagee; and, consequently, that although more than twenty years had elapsed since default was made in payment of the money, still the mortgagee was not barred by the statute of limitations; for though it was not found as a fact in this case that there was any payment of interest, yet the court would presume that it was paid. If no interest had been paid, that would have warranted the jury, under the direction of the Judge, in finding that there had been a re-conveyance. The argument against this view of the case proceeded on the ground, that the mortgagor was in possession by wrong; but as the special verdict did not find a wrongful possession, the court of King's Bench would certainly not presume it. In this case it was also held, that an entry is not necessary to avoid a fine levied by the mortgagor. 5 Barn. & Ald. 687.

No. XXVII.

DEVISE of Estates held in Mortgage.

[Antea, p. 421, of this edition, n. (N).]

AND I give and devise unto the said A. B. and C. D., their heirs and assigns, all such real estates as are now vested in me by way of mortgage, in order to enable them with the greater ease and convenience to recover, receive, and get in the money, secured by such mortgages, for the purposes of this my will; and I also give and devise unto the said A. B. and C. D. all such real estates as are now vested in me, upon trust, for any person or persons, to hold the same estates unto the said A. B. and C. D., their heirs and assigns, upon the trusts affecting the same. [See another form of this devise, 4 Madd. Rep. 440.]

No. XXVIII. § 1.

MEMORIAL OF MORTGAGE.

[Antea, p. 619, of this edition, n. (K).]

A MEMORIAL, to be registered pursuant to an act of parliament, made in the seventh year of her late Majesty Queen Anne, intituled, "An act for the public registering of deeds, conveyances, wills, and other incumbrances, which shall be made, or that may affect any honors, manors, lands, tenements, or hereditaments, within the county of Middlesex, after the 29th day of September, 1709."

OF INDENTURES of lease and [appointment and] release, the lease bearing date the 4th day of June, in the year of our Lord 1832, and made between, &c.; and the [appointment and] release bearing date the 5th day of the same month and year, and made between, &c.; and which said indentures of lease and [appointment and] release are respectively witnessed by A. B., of, &c., and C. D., of, &c., and are hereby required to be registered by the said (mortgagee.) As witness his hand and seal, this 8th day of June, 1832.

Signed and sealed, in the presence of

A. B.
C. D.

(Mortgagee.) L. S.

No. XXVIII. § 2.

CERTIFICATE to discharge Mortgage.

To the Registrar of the County of Middlesex, or his Deputy.

I, (*mortgagee*), of, &c. do hereby certify that the (*mortgagor*), of, &c. hath paid and satisfied all such sum and sums of money as were due and owing upon or by virtue of certain indentures of lease and [*appointment and*] release by way of mortgage, bearing date respectively on or about the 4th and 5th days of June, in the year of our Lord 1822, and made between the said (*mortgagor*) of the one part, and me the said (*mortgagee*) of the other part, a memorial whereof was registered on the 8th day of the same month and year, Book B. No. 587. And I do hereby require an entry of such payment and satisfaction to be made in the Register Book, wherein the same is registered, pursuant to the act of parliament in that case made and provided. As witness my hand, this 10th day of September, 1825.

(*Mortgagee.*) L. S.

Signed, and satisfaction acknowledged,
in the presence of

A. B.
C. D.

No. XXIX.

MORTGAGE IN FEE by Husband and Wife of Freehold Estate of the Husband.

[*Antea*, p. 680, of this edition, n. (D).]

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*), and Sarah his wife, of the one part; and (*mortgagee*), of the other part. WHEREAS the said (*mortgagor*) is seised to him and his heirs in fee simple (subject to the title of dower of the said Sarah his wife) of and in the messuages or tenements and hereditaments, hereinafter released or otherwise assured or intended so to be. [*Recite mortgagee's agreement to advance money and agreement to settle equity of redemption in manner after mentioned, No. I. pl. 12.*] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in, &c. [*Proceed as in No. II. (the husband conveying alone) to the habendum in fee inclusive, then add*] subject nevertheless to the proviso or agreement for redemption hereinafter contained; AND FOR THE purpose of absolutely barring and extinguishing the dower, right and title of dower and thirds, which the said Sarah, the wife of the said (*mortgagor*), can, shall, or may have, claim, or be entitled to, of, in, to, out of, or upon the said messuages or tenements and hereditaments, hereby released or otherwise assured or intended so to be, and for the more effectually conveying and assuring the same messuages or tenements and hereditaments unto, and to the use of the said (*mortgagee*), his heirs and assigns, subject to the proviso or agreement for redemption hereinafter contained; and for settling and assuring the same messuages or tenements and hereditaments, to the uses, upon the trusts, and for the ends intents and purposes hereinafter limited, expressed, and declared, of and concerning the same, the said (*mortgagor*) doth hereby for himself, his heirs, executors, and administrators, and for the said Sarah his wife, covenant, promise, and agree, &c. [*Add covenant to levy a fine as in the next precedent, No. XXX. to the use of the mortgagee in fee, subject to redemption, proviso, No. I. pl. 79. Instead of the re-conveyance being to the mortgagor in fee, introduce the common form of uses to prevent dower, and add to those uses after the words, "to the intent that the present or any future wife of the said (mortgagor) may not be entitled to dower out of the said hereditaments," the words, "either as against the said (mortgagee) or the said (mortgagor), their or either of their heirs or assigns."* Add covenant for payment of money and other mortgage covenants, as in the next precedent.] IN WITNESS, &c.

No. XXX.

MORTGAGE IN FEE of Wife's Estate of Inheritance.

[*Antea*, p. 739, of this edition, n. (B).]

THIS INDENTURE, made, &c.—BETWEEN A. B. and C. his wife of the one part, and E. F. of the other part. WHEREAS the said A. B. in right of his said wife, is seised to him and the heirs of the said C. of the lands and hereditaments hereinafter described, and intended to be hereby released, with the appurtenances, for an estate of inheritance in fee simple in possession. [*Recite mortgagor's occasion to borrow, No. I. pl. 4.*] NOW THIS INDENTURE WITNESSETH, that

in pursuance of the said agreement, and for and in consideration of the sum of 1000*l.* of lawful money, current in England, to the said A. B. well and truly paid by the said E. F. at or immediately before the sealing and delivery of these presents, with the privity and approbation of the said C. B. (testified by her being a party to and executing these presents), the receipt and payment of which said sum of 1000*l.* they the said A. B. and C. his wife do [*&c. acknowledge, No. I. pl. 62*]; they the said A. B. and C. his wife, HAVE and each of them hath granted, bargained, sold, aliened, released, and confirmed, and by these presents do and each of them DOOTH grant, bargain, sell, alien, release, and confirm unto the said E. F. (in his actual possession, [*&c. No. I. pl. 68*]); and to his heirs and assigns, ALL THOSE pieces or parcels of land, &c. [*Insert parcels, general words, No. I. pl. 70; reversion, ib. pl. 72; estate, ib. pl. 73.*] TO HAVE AND TO HOLD the said lands, hereditaments, and all and singular other the premises hereby released, or expressed and intended so to be, with their appurtenances, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns, for ever, subject, nevertheless, to the proviso or agreement for redemption of the same premises hereinafter contained; AND FOR THE considerations aforesaid, and for more effectually conveying and assuring the said lands and hereditaments hereby released, or otherwise assured or intended so to be, HE the said A. B. doth hereby for himself and for the said C. his wife, her heirs, executors, and administrators, covenant, promise, and agree, to and with the said E. F., his heirs, executors, administrators, and assigns, that they the said A. B. and C. his wife (she hereby consenting thereto, testified by her execution of these presents) shall and will, at the costs and charges of the said A. B., as of Michaelmas Term last, or before the end of Hilary Term now next ensuing, acknowledge and levy before his Majesty's Justices of the court of Common Pleas at Westminster, unto the said E. F. and his heirs, one or more fine or fines *sur convenance de droit come ceo, &c.* whereupon proclamations shall be had and made according to the statute in that case made and provided; and the usual course, order, and manner of fines for assurance of lands in like cases used and accustomed of all the said lands and hereditaments hereby released or expressed and intended so to be, with their appurtenances, by such apt and convenient names, quantities, qualities, and descriptions, as shall be sufficient to ascertain and comprise the same; AND IT is hereby declared and agreed by and between the parties hereto, that the said fine so as aforesaid, or in any other manner or at any other time, to be acknowledged and levied, and all and every other fine and fines whatsoever already acknowledged and levied, and hereafter to be acknowledged and levied of the said lands and hereditaments, or any part thereof, by or between the said parties to these presents, either alone or jointly with any other person or persons, or to which they or either of them are or shall or may be parties or privies, or party or privy, shall operate and enure, and be adjudged, construed, deemed, and taken to operate and enure, TO THE USE of the said E. F., his heirs and assigns for ever; but subject, nevertheless, to the proviso or agreement for redemption hereinafter contained, that is to say; [*Proviso that "if the said A. B. and C. his wife, or either of them, or the heirs, executors, or administrators of the said C. B., do and shall pay," &c. No. I. pl. 97; then the said E. F. shall reconvey "unto the said C. B., her heirs and assigns, or as she or they or other the person or persons for the time being entitled to the equity of redemption of and in the said mortgaged premises, shall in that behalf order or direct, free," &c. Add covenant by husband to pay mortgage money, No. I. pl. 87; that he and wife, or one of them, hath good right to convey, ib. pl. 93; that in default of payment mortgagee may enjoy, ib. pl. 97; that husband and wife and all other persons will do all acts for further assurance, ib. pl. 100. And lastly "that it shall be lawful for the said A. B. and C. his wife, her heirs and assigns, or other the person or persons for the time being entitled to the equity of redemption of and in the said mortgaged premises, peaceably and quietly to" enjoy, &c. ib. pl. 104.*] IN WITNESS, &c.

No. XXXI.

THE form intended to be introduced here has been anticipated, *No. I. pl. 109.*

No. XXXII. § 1.

FURTHER CHARGE.

THIS INDENTURE, made, &c.—BETWEEN (*mortgagor*) of the one part, and (*mortgagee*) of the other part. [*Recite mortgage, No. I. pl. 23, and sum due, ib. pl. 37.*] AND WHEREAS the said (*mortgagor*) having occasion for the further sum of 500*l.* hath applied to the said (*mortgagee*) to lend and advance him the same on the security of the said premises, which the said (*mortgagee*)

hath consented and agreed to do. NOW THIS INDENTURE WITNESSETH, that in [consideration, No. I. pl. 62] HE the said (*mortgagor*), for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said (*mortgagee*), his executors, administrators, and assigns, that all and singular the said messuages or tenements and hereditaments comprised in the said recited indenture of mortgage, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, shall henceforth stand, remain, continue, and be a security for and be charged and chargeable with, as well the payment of the said sum of 500*l.* now advanced and lent, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, free and clear of and from all and all manner of levies, taxes, assessments, and impositions whatsoever, as also with the payment of the said sum of 1000*l.* before lent and advanced, and the interest thereof, making together the sum of 1500*l.*, and that the said messuages or tenements and hereditaments, or any part thereof, shall not be redeemed or redeemable until full payment and satisfaction shall be made unto the said (*mortgagee*), his executors, administrators, and assigns, as well of the said sum of 500*l.* now advanced, and the interest thereof, as also of the said sum of 1000*l.* before advanced, and the interest thereof; any thing hereinbefore or in the said above in part recited indenture contained, to the contrary thereof in anywise notwithstanding. [Add covenant for payment of 500*l.* and interest on demand, No. I. pl. 87.] IN WITNESS, &c.

No. XXXII. § 2.

FURTHER CHARGE by Indorsement.

THIS INDENTURE, made, &c.—BETWEEN the within named (*mortgagor*) of the one part, and the within named (*mortgagee*) of the other part. WHEREAS the said (*mortgagee*) hath, since the execution of the within written indenture, advanced to the said (*mortgagor*) at various times the sum of 500*l.*, as he the said (*mortgagor*) doth hereby admit and acknowledge (testified by his execution of this indorsement); and for better securing the re-payment thereof to the said (*mortgagee*), his executors, administrators, and assigns, the said (*mortgagor*) hath agreed to charge the same upon the within mentioned hereditaments in manner hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that for and in consideration of the said sum of 500*l.* having been so advanced and lent as aforesaid, he the said (*mortgagor*), for himself, his heirs, executors, and administrators, doth hereby covenant, grant, declare, and agree, to and with the said (*mortgagee*), his executors, administrators, and assigns, that all and singular the messuages, lands, tenements, and hereditaments, in and by the within written indenture granted and released, or otherwise conveyed or mentioned or intended so to be, unto the said (*mortgagee*), his heirs and assigns, by way of mortgage, with their and every of their appurtenances, shall stand charged and chargeable with and continue and be a security unto him the said (*mortgagee*), his executors, administrators, and assigns, not only for the said sum of 1000*l.* and interest as in the within written indenture mentioned, but also for the payment of the said sum of 500*l.* now acknowledged to be due to the said (*mortgagee*) by the said (*mortgagor*), testified as aforesaid, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year; and that the said messuages, lands, tenements, and hereditaments, or any part thereof, shall not be redeemed or redeemable either at law or in equity, until not only the said sum of 1000*l.* and interest, but also the said sum of 500*l.* and interest, together with all costs, charges, damages, and expenses occasioned by or in relation thereto, shall be fully paid and satisfied unto the said (*mortgagee*), his executors, administrators, and assigns, according to the true intent and meaning of these presents. [Add covenant for payment of money on a given day, No. I. pl. 87.] AND ALSO shall and will until full payment and satisfaction of the said sum of 500*l.* and interest, make, do, execute, and perfect, or cause or procure to be made, done, executed, and perfected, all such further and other acts, deeds, matters, and things whatsoever, for the further, better, and more effectually or satisfactorily securing the same, as by the said (*mortgagee*), his heirs, executors, administrators, or assigns, or any of them, or his or their counsel in the law, shall be reasonably required in that behalf, and tendered to be made, done, and executed. IN WITNESS, &c.

No. XXXIII.

NOTICE of Repayment of Money.

[Antea, p. 934, of this edition, n. (R).]

SIR,—Please to take notice that I shall, at the expiration of six calendar months from the date hereof, being the 5th day of November now next ensuing, pay unto you, your executors, administrators, or assigns, the sum of 700*l.* due and owing to you from me, on mortgage of

estates situated at S. in the county of Wilts, by virtue of an indenture, bearing date, &c. and made between, &c. As WITNESS my hand, this 5th day of April, 1822.

(Mortgagor.)

To (Mortgagee) of, &c.

No. XXXIV.

MORTGAGE OF A REVERSION for a Term of Years.

THIS INDENTURE, made, &c.—BETWEEN (mortgagor) of the one part, and (mortgagee) of the other part. [Recite will devising to A. P. for life, with remainder to the mortgagor in fee. Testator's death without revocation, No. I. pl. 52; and mortgagor's occasion to borrow, ib. pl. 4. Proceed as in No. III. s. 1. making the habendum to the mortgagee ("subject nevertheless to the life estate of the said A. B.") for a term of years, "commencing from the day of the date of these presents," subject to the proviso, &c. and yielding and paying, &c. Proviso, No. I. pl. 77. Covenant to pay money, ib. pl. 87; that mortgagor has good right to demise, ib. pl. 23; that after default and death of the said A. B. and during the residue of the said term, mortgagee may enter and enjoy, &c. ib. pl. 97; free from incumbrances except the said life estate of the said A. B. ib. pl. 98; for further assurance at all times during the term, ib. pl. 100; proviso that until default in payment, mortgagor may "hold and enjoy," &c. ib. 104.] IN WITNESS, &c.

No. XXXV. § 1.

MORTGAGE OF ADVOWSON to Trustee in Trust to sell.*

THIS INDENTURE, made, &c.—BETWEEN (mortgagor) of the one part, and (mortgagee) of the other part. WHEREAS the said (mortgagor) being seised of an estate of inheritance in fee-

* The sale of an advowson during vacancy is not simony, like a sale of the next presentation; but it is void at common law. Per Lord Hardwicke in *Grey v. Hesket*, Amb. 268, et vide *Durston v. Lands*, 1 Vern. 411. If this be the case, and a mortgagee cannot present on an avoidance (as stated ante, 197, of this edit.) a mortgage of an advowson is obviously a very inelegible security. The statute 13 Eliz. c. 20, enacted, "that no lease of any benefice with cures, should endure longer than while the lessor should be resident and serving the cure of such benefice, without absence above eighty days in any one year, and that all chargings of such benefice should be utterly void." On the 1st section of this statute, the following cases have occurred.—*Doe v. Mears*, Cowp. 129. *Doe v. Barber*, 2 T. R. 749, and *Mowys v. Leake*, 8 ib. 411. But no case has directly obtained the judgment of the court on the question, how the disposition of the benefice by way of mortgage, or in trust for an annuitant, will be effected by the second section of the act? In *Doe v. Mears* a creditor was in possession under a sequestration; an annuity creditor brought an ejectment on a prior demise of the rectory for securing the annuity; the judgment creditor pleaded, that the demise was avoided by eighty days non-residence of the rector, and judgment was given accordingly. Hence, it should appear, that neither the court nor the bar considered the grant to be absolutely void independently of the non-residence. There is also a stronger case of *Errington v. Howard*, Amb. 485, where a rector entitled to an annual stipend in lieu of tithes, to be collected by a pound rate, assigned it, by way of mortgage, and afterwards a creditor of the rector got judgment, and in the regular course obtained a sequestration of the stipend. The mortgagee was preferred to the sequestration creditor, who was directed to account to him for the stipend from the time he had notice of the mortgage, Amb. 485. The question was incidentally raised in *Mowys v. Leake*, supra; but Lord Kenyon would not give any judicial opinion whether the annuity deed was void or not by the statute of Elizabeth. He intimated, however, an opinion that the statute contained some very strong expressions. 8 T. R. 415. The statute cannot be mistaken. It clearly avoids all dispositions and chargings of the benefice; but the 13 Eliz. c. 20, has been repealed by the 43 Geo. 3. c. 84, which again in its turn has been repealed by the 57 Geo. 3. c. 99, so reviving the 13 Eliz. c. 20. The 57 Geo. 3. c. 99, in repealing the 43 Geo. 3, repealed also part of 13 Eliz. but it did not in terms repeal the clause relating to charging of livings, consequently the foregoing question may be considered as still open to dispute. The only clear way, therefore, of incumbering an advowson is by sequestration, and for that purpose a warrant of attorney to con-

simple of and in the rectory or advowson of L., in the county of Wilts, and having occasion for the sum of 800*l.* hath applied to and requested the said (*mortgagee*) to lend and advance him that sum, which the said (*mortgagee*) hath consented and agreed to do, on having the same secured to him with interest, by a warrant of attorney to confess judgment (which is already prepared, and is intended to bear even date with these presents), and such conveyance by way of mortgage of the said advowson, right of patronage, and hereditaments hereinafter described, with such covenants, powers, provisos, stipulations, and agreements as are hereinafter contained. NOW THIS INDENTURE WITNESSETH, that in pursuance and execution of the said agreement, and in consideration, [*&c. No. I. pl. 62*]; HE the said (*mortgagor*) hath given, granted, bargained, sold, aliened, and released, and by these presents DOT*H* give, grant, bargain, sell, alien, and release unto the said (*mortgagee*), [*in his actual possession, &c. No. I. pl. 68.*] and to his heirs, ALL THAT the advowson, right of nomination, presentation, collation, donation, patronage, and free disposition of, in, and to all that rectory, vicarage, parsonage, or parish church of L., in the said county of Wilts, &c. and also all those glebe and other lands, &c. Together with all houses, out-houses, buildings, barns, stables, coach-houses, dove-houses, yards, glebe lands, tithes, and portions of tithes, tenths, oblations, obventions, fruits, dues, perquisites, profits, and emoluments of what nature or kind soever, to the said advowson, rectory, or parsonage belonging, or in anywise appertaining, or yearly or otherwise increasing, growing, or becoming due and payable within the parish of L. aforesaid, and all ways, [*&c. No. I. pl. 70*; *reversion, ib. pl. 72*; *estate, ib. pl. 73.*] TO HAVE AND TO HOLD the said advowson, glebe land, hereditaments, and all and singular other the premises hereby released, or otherwise assured or intended so to be, with their and every of their rights, members, privileges, appendages, and appurtenances, unto and to the use of the said (*mortgagee*), his heirs and assigns for ever; subject nevertheless to the proviso or agreement for redemption hereinafter contained. [*Add proviso, No. I. pl. 77*; and *trusts for sale, No. VI.*] IN WITNESS, &c.

No. XXXV. § 2.

MORTGAGE OF TITHES.

THIS INDENTURE, made, &c.—BETWEEN the Rev. A. B., clerk, of the one part, and C. D. of the other part. WHEREAS the said A. B. is rector of the rectories and parish churches of Leigh and Farleigh, in the county of Somerset, and vicar of the vicarage of Steinbrook, in the same county. [*Recite policy of insurance, No. I. pl. 29*; and *that A. B. has occasion to borrow, ib. pl. 4.*] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in [*consideration, No. I. pl. 62*]; HE the said A. B. hath demised, leased, and to farm letten, and by these presents DOT*H* demise, lease, and to farm let, unto the said C. D. his executors, administrators, and assigns, ALL THOSE the tithes, compositions, rents, and agreements for tithes, to be from time to time payable for or in respect of the said rectories and vicarage of the parishes of Leigh, Farleigh, and Steinbrook respectively, or any of them; and all oblations, obventions, offerings, emoluments, privileges, and advantages whatsoever to the said rectories, vicarage, tithes, or tenths, hereby demised or intended so to be, belonging or in anywise appertaining, or accepted, reputed, deemed, taken or known as part, parcel, or member of the same, or any of them respectively. TO HAVE AND TO HOLD the said tithes, tenths, and all and singular other the premises hereby demised, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances unto the said C. D., his executors, administrators, and assigns, for and during, and unto the full end and term of ninety-nine years, if the said A. B. shall so long live, and his

heirs and assigns, should always form part of the security in a mortgage of an advowson.

A parson or vicar is restrained from making longer leases of his benefice and glebe than for twenty-one years, or three lives, even with consent of the patron and ordinary, and without such consent he is not enabled to make any lease at all, so as to bind his successor. Nevertheless such leases are good as against the lessor himself during his life, if he be a sole corporation, as also against an aggregate corporation, so long as the head of it lives; for the disabling acts on this subject were intended for the benefit of the successor only; and no man shall take advantage of his own wrong. Co. Litt. 45. The consequence is, that a parson or vicar may mortgage his living for the term of his life, which will be void on his resignation or translation. The mortgage of such property may therefore be by demise for a term of years, if the incumbent shall so long live, with a covenant that he will not resign or do any act to vacate the living without the consent of the incumbrancer, and that if he be promoted, he will forthwith, at his own costs, execute a deed charging his new benefice with the incumbrance. A form of this description of mortgage will be found in the succeeding section of this number.

estate and interest in the said rectories and vicarage of Leigh, Farleigh, and Stainbrook respectively, or any of them, shall so long continue, YIELDING AND PAYING therefore yearly and every year, during the continuance of the said term hereby granted, the rent of one pepper-corn, if the same shall be lawfully demanded, subject nevertheless to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration hereinbefore expressed, HE the said A. B. [doth assign, &c. Add assignment of policy of insurance, No. IX. § 4; Proviso for redemption, No. I. pl. 77; Covenants by mortgagor for payment of money, ib. pl. 87; That he has good right to demise and assign, ib. pl. 95; Not to vacate rectory or policy of insurance, Nos. IX. § 4. and XXXV. § 3; After default mortgagee may enter and receive tithes, No. I. pl. 97; paying nevertheless the salaries of curates, No. XXXV. § 3; For further assurance, No. I. pl. 100; and to demise benefices taken in exchange, No. XXXV. § 3; Covenants as to policy of insurance, No. IX. § 4; and proviso that mortgagor shall enjoy till default, No. I. pl. 104.] IN WITNESS, &c.

No. XXXV. § 3.

TRUSTS AND COVENANTS in a Mortgage of Tithes.

To collect and sell tithes, or make compositions,

AND IT IS HEREBY declared and agreed, by and between all the said parties to these presents, as far as they respectively are interested, that the tithes, tenths, and all and singular other the premises hereby demised, or otherwise assured or intended so to be, unto the said (trustee), his executors, administrators, and assigns, with their and every of their rights, members, and appurtenances, were and are so demised to the said (trustee), his executors, administrators, and assigns, upon the trust and for the ends intents and purposes following (that is to say), UPON TRUST that he the said (trustee), his executors, administrators, and assigns, do and shall yearly and every year, during the continuance of this demise, and at such days and times, or seasons in the year, as are most convenient or accustomed for that purpose, collect and gather in, or cause and procure to be collected and gathered in, the tithes, both great and small, of the said rectory of A. and vicarage of B., which shall and may become due during the continuance of this demise; and do and shall from time to time, when and as often as the same shall be so collected and gathered in as aforesaid, or as soon as conveniently may be, sell and dispose of the same tithes, or such part thereof as shall be gathered in kind, either by public auction or private contract, for the most money or best price or prices, which can be seasonably obtained for the same; and do and shall stand and be possessed of the money to arise from such sale or sale as aforesaid, upon the trusts and for the several ends intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same; PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said (trustee), his executors, administrators, and assigns, at any time, and from time to time during the continuance of this demise, to make or enter into any agreement either for one whole year, or for any term not exceeding five years, for the growing crops or titheable articles, with each, any, or either of the owners or occupiers of lands or hereditaments, situate in the said parishes of A. and B., or either of them, to receive such annual sum or sums of money as the said (trustee), his executors, administrators, and assigns, shall in his or their discretion think fit, as a composition for and in lieu of the tithes, tenths, or other ecclesiastical dues growing, renewing, or becoming payable in respect of the lands of such owner or occupier respectively; and that the said (trustee), his executors, administrators, and assigns, shall and may receive such sum and sums of money in lieu of, and as a composition

and stand possessed of produce to pay expenses, curates, insurance, interest, and annuity;

for such tithes, tenths, or other ecclesiastical dues accordingly [Here add a power to the trustee to lease the tithes for any term not exceeding seven years.] AND IT IS HEREBY declared and agreed, by and between all the said parties to these presents, that he the said (trustee), his executors, administrators, and assigns, shall stand and be possessed of and interested in the money to arise and produced by such sale or sales, and to be received as and for such compositions as aforesaid, and of the rents to be reserved on such leases as may be granted under the power hereinbefore contained; as also of the said tithes in kind, until converted into money, under the power for that purpose hereinbefore contained, upon the trusts and for the several ends intents and purposes hereinafter mentioned (that is to say), UPON TRUST, in the first place, that he the said (trustee), his executors, administrators, and assigns, do and shall deduct, retain, satisfy, and pay to and for himself and themselves respectively, the costs, charges, and expences of and attending the execution of these presents, and of the trusts hereby reposed in him and them respectively; and, in the next place, do and shall pay and allow to the person or persons, who for the time being shall perform the cures of the parish churches of A. and B. aforesaid, such annual stipends or sums of money for performing the same respectively, as shall be appointed and fixed by the bishop for the time being of the diocese; AND ALSO do and shall pay the premiums which may from time to time become due and payable in respect of the said policy or instrument of insurance, when and as the same premiums shall become due and payable; and, in the next place,

do and shall pay unto the said (mortgagee), his executors, administrators, and assigns, yearly and every year, during the continuance of this demise, interest for the said sum of 1000*l.*, after the rate of 5*l.* for every 100*l.* by the year; AND IF after such payments as aforesaid, there shall remain a surplus of 100*l.* or upwards, upon trust that he the said (trustee), his executor, administrators, and assigns, do and shall pay unto the said (mortgagor) the sum of 50*l.* a year for his support and maintenance; AND DO AND SHALL pay, apply, and dispose of the residue or surplus of such tithes, proceeds, compositions, rents, and premises, in the purchase of 3 per cent. consolidated bank annuities, AND stand and be possessed of the same, in trust to alter and vary the stocks, funds, and securities, in or upon which the same shall from time to time be invested, as he the said (trustee), his executors, administrators, and assigns, with the consent in writing of the said (mortgagee), his executors, administrators, and assigns, shall think fit, and from time to time apply the dividends of the annuities which shall have been purchased with the said trust monies and funds in the purchase of other like annuities, so as to increase the amount of the said 3 per cent. consolidated bank annuities; AND do and shall stand and be possessed of such annuities when purchased, and also of the money which shall become payable, and be received by virtue of the said policy of insurance hereinbefore assigned, or any renewed policy of insurance to be obtained under the provisions hereinbefore contained; UPON TRUST, in the first place, to apply the same, or so much thereof as shall be required, in payment, or part payment to the said (mortgagee), his executors, administrators, and assigns, of the said principal sum of 1000*l.* and interest, or so much of the same sum and interest respectively as shall be then due and owing to him and them; AND do and shall, after full payment of the said sum of 1000*l.* and interest, and all other expences, salaries to curates, premiums for insurance, or otherwise incidental to the execution of the trusts hereby reposed in him the said (trustee), his executors, administrators, and assigns, pay the residue or surplus (if any) of the money which shall then remain in his or their hands unapplied, to any of the purposes aforesaid, and also the residue (if any) of the said 3 per cent. consolidated bank annuities, to the said (mortgagor), his executors, administrators, and assigns. *[Add covenant by mortgagor that he has good right to demise and assign, No. I. pl. 95];* AND ALSO that the said (mortgagor) shall not nor will at any time during the continuance of the demise hereby made, vacate or avoid the said rectories of A. and B., or either of them, without the consent in writing of the said (mortgagee), his executors, administrators, or assigns, first had and obtained for that purpose; AND ALSO that in case the said (mortgagor) should at any time or times hereafter be preferred to any other ecclesiastical benefice or benefices, in lieu of or in exchange for or in addition to the said rectories of A. and B., or either of them, or in lieu of or in exchange for or in addition to his church or his ecclesiastical preferment for the time being, then and in such case the said (mortgagor) shall and will, at his own costs and charges, in all things, within three calendar months next after such event shall happen, demise the new or exchanged benefice or benefices to the said (trustee), his executors, administrators, and assigns, upon the same or the like trusts, and to for and upon the same or the like ends, intents and purposes, and in the same or the like manner in all respects, as the said tithes, tenths, and other ecclesiastical dues belonging to the said rectories of A. and B. respectively, are hereby demised or otherwise assured or intended so to be, or as near thereto as may be, and the circumstances of the case will admit. *[Add covenant by mortgagor for further assurance. Declaration that receipts of trustee shall be good discharges; and proviso for change and indemnity of trustee.]* IN WITNESS, &c.

and invest surplus in funds, and pay principal when called for, and surplus to mortgagor.

Covenants not to avoid rectories.

To demise new benefices within three months.

No. XXXVI. § 1.

MORTGAGE OF STOCK.

[Antea, p. 1206, of this edition.]

THIS INDENTURE, made, &c.—BETWEEN (mortgagor) of the first part, (mortgagee) of the second part, and (trustee) of the third part. WHEREAS the said (mortgagor) being possessed of the sum of 3000*l.* 3 per cent. consolidated bank annuities, and having occasion for the sum of 700*l.*, but by reason of the depressed state of the funds he cannot at present sell out the said annuities without a considerable loss, hath applied to and requested the said (mortgagee) to lend and advance him that sum, which the said (mortgagee) hath consented and agreed to do, on having the repayment thereof, with interest secured to him by a mortgage of the said stock in manner hereinafter mentioned. AND WHEREAS in pursuance of the said agreement, and in consideration of the sum of 700*l.* of good and lawful sterling money, current in England, paid to the said (mortgagor) by the said (mortgagee), at or immediately before the execution of these presents, the receipt, &c. *[No. I. pl. 62.]* the said (mortgagor) hath this day transferred the sum of 3000*l.* 3 per cent. consolidated bank annuities, unto and into the name of the said (trustee), in

the books of the Governor and Company of the Bank of England, on the trusts nevertheless, and to and for the ends, intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same. NOW THIS INDENTURE WITNESSETH, that in consideration of the said loan and payment, and in pursuance of the said agreement, the said (*mortgagor*) doth hereby direct and appoint that the said (*trustee*), his executors, administrators, and assigns, shall stand and be possessed of and interested in, the said sum of 3000*l.* 3 per cent. consolidated bank annuities, upon the trusts, and for the ends, intents and purposes hereinafter contained; AND the said (*trustee*), (by the direction of the said (*mortgagor*), and with the privity and approbation of the said (*mortgagee*), testified by their respective executions of these presents), NOW, by these presents, for himself, his heirs, executors and administrators, covenant, promise, declare and agree, to and with the said (*mortgagor*), his executors, administrators, and assigns, and also with the said (*mortgagee*), his executors, administrators, and assigns, that he the said (*trustee*), his executors, administrators, and assigns, shall and will stand and be possessed of, and interested in, the said sum of 3000*l.* 3 per cent. consolidated bank annuities; UPON TRUST, that if the said (*mortgagor*), his heirs, executors, or administrators, do and shall, on the 5th day of November now next ensuing, at or in the common dining hall of Lincoln's Inn, London, well and truly pay, or cause to be paid, unto the said (*mortgagee*), his executors, administrators, and assigns, the sum of 700*l.* of lawful English money, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, without any deduction or abatement whatsoever, as also 5*l.* to the said (*trustee*), his executors, administrators, and assigns, then the said (*trustee*), his executors, administrators, and assigns, shall and will, with the consent and concurrence of the said (*mortgagee*), his executors and administrators, re-transfer the said sum of 3000*l.* 3 per cent. consolidated bank annuities, unto and into the name of the said (*mortgagor*), his executors, administrators, or assigns, or unto such other person or persons as he or they shall direct or appoint, freed from all incumbrances to be made, done, or committed by the said (*trustee*), or the said (*mortgagee*) respectively, or their respective executors, administrators, and assigns, in the mean time. BUT in case the said (*mortgagee*), his heirs, executors, administrators, and assigns, shall make default in payment of the said sum of 700*l.* and interest, on the day hereinbefore appointed for payment thereof, THEN UPON TRUST, that he the said (*trustee*), his executors, administrators, and assigns, do and shall, with the concurrence of the said (*mortgagee*), his executors, administrators, and assigns, and he and they are hereby authorized and required, without any further consent or concurrence of the said (*mortgagor*), his executors, or administrators, to make sale and absolutely dispose of the whole or a part of the said sum of 3000*l.* 3 per cent. consolidated bank annuities, as the case may require, for as much money sterling as the stock sold will then produce; AND do and shall, out of the produce thereof, pay unto the said (*mortgagee*), his executors, administrators, and assigns, the said sum of 700*l.* and all interest for the same, which shall then remain unpaid, up to and inclusive of the day of payment, and all costs, charges and expences of and attending such sale, and the execution of the trusts hereby reposed in him the said (*trustee*), his executors, administrators, and assigns; AND do and shall pay the residue or surplus of the money arising from the sale of the said annuities, after such payments and deductions as lastly aforesaid, and transfer the residue or surplus of the said annuities which shall remain undisposed of, for any of the purposes aforesaid, unto the said (*mortgagor*), his executors, administrators, and assigns, or as he or they shall direct or appoint; and upon no other trust, nor for any other end, intent, and purpose whatsoever. AND IT is hereby declared and agreed that the receipts of the said (*trustee*), his executors, administrators, and assigns, shall be good and sufficient discharges for the money which shall be therein expressed to be, or to have been received, and that the person paying the same shall not be answerable or accountable for any loss or misapplication thereof. [Add covenant for payment of money, No. I. pl. 87; and for further assurance, No. I. pl. 100.] PROVIDED ALWAYS, and it is hereby declared and agreed, and the said (*mortgagor*) doth hereby direct and appoint, that until default shall be made in payment of the said sum of 700*l.* and interest, contrary to the proviso for that purpose hereinbefore contained, it shall and may be lawful to and for the said (*mortgagor*), to receive and take the dividends, interest, and income of the said sum of 3000*l.* 3 per cent. consolidated bank annuities when and as the same shall become due, without any let, suit, trouble, or interruption by the said (*mortgagee*), or the said (*trustee*), or either of them, their, or either of their, executors, administrators, or assigns respectively. [Add short clause for charge and indemnity of trustee.] IN WITNESS, &c.

No. XXXVI. § 2.

CONDITION of Joint and several Bond, to replace Stock and pay intermediate Dividends.

[BOND in the usual Form. See No. VII.]

WHEREAS the above bounden A. B., at the special instance and request of the above named C. D. and to serve the present occasions of the said A. B., hath, on the day of the date of the above written bond or obligation, lent to the said A. B. the sum of 1000*l.* 3 per cent. consolidated bank annuities, and hath also transferred the same to the said A. B., as he the said A. B. and the said E. F., his surety, do hereby acknowledge, and as by the books of the Governor and Company of the Bank of England will appear. AND WHEREAS previous to and in consideration

of the said loan and transfer of the said stock to the said A. B. by the said C. D. as aforesaid, the said A. B. agreed with the said C. D., within six months next after the day of the date of the said bond or obligation, to transfer, or cause or procure to be transferred, unto and into the name or names of the said C. D., his executors or administrators, in the proper books of the Governor and Company of the Bank of England, the sum of 1000*l.* 3 *per cent.* consolidated bank annuities, and likewise to answer and make good to the said C. D., his executors and administrators, all dividends, interest, and produce which, in the mean time, should and might be paid or payable for and in respect of the said sum of 1000*l.* stock so lent and transferred as aforesaid, or which the said C. D., his executors or administrators, could or might have received or would have been entitled unto, in case the same capital stock had remained and continued in the books of the Governor and Company of the Bank of England in the name or names and as the property of the said C. D., his executors and administrators; and for the better securing to the said C. D., his executors and administrators, the due performance of the said agreement, on the part of the said A. B. to be perfected as aforesaid, the said E. F. (at the instance and request of the said A. B.) agreed to enter into the above written bond or obligation, subject to the condition hereinafter contained. Now THE CONDITION of the above written bond or obligation is such, that if the above bounden A. B. and E. F., or either of them, their or either of heirs, executors, or administrators, do and shall, at their and his own costs and charges respectively, well and truly transfer, or cause or procure to be well and truly transferred and replaced, unto and into the name or names of the said C. D., his executors or administrators, in the proper books of the Governor and Company of the Bank of England, the sum of 1000*l.* 3 *per cent.* consolidated bank annuities, on or before the 10th day of August now next ensuing, and likewise do and shall from time to time answer, pay, and make good unto the said C. D., his executors and administrators, such sum or sums of money as shall be equal to all dividends, interest, or produce which, in the mean time, till the said sum of 1000*l.* stock shall be replaced as aforesaid, shall or may be made, paid, or received, for or on account of the said capital stock so lent and transferred by the said C. D. to the said A. B. as aforesaid, or which the said C. D., his executors or administrators, could have received or would have been entitled to, in case the same stock had remained and continued standing in the books of the Governor and Company of the Bank of England, in the name or names and as the property of the said C. D., his executors or administrators; and also do and shall answer, pay, and make good the same sum or sums of money, on the day or reciprocal days on which the same dividends, interest, or produce shall become due and payable, and all expences attending the re-transfer of the said capital stock of 1000*l.*, when the same shall be made, and of obtaining or enforcing the re-transfer of the same, and payment of the said sums hereinbefore agreed to be paid, in lieu of the dividends, interest, and produce of the said capital stock; then the above written bond or obligation shall be void and of none effect whatsoever, or else be and remain in full force and virtue.

No. XXXVII.

MORTGAGE IN FEE of Land and Slaves in the Island of St. Vincent.

[*Antea*, p. 1072, of this edition.]

THIS INDENTURE, made, &c.—BETWEEN A. of the island of St. Vincent, merchant, and Mary his wife, of the one part, and B. and C. of, &c. merchants, trading (under the firm of B. C. and company) of the other part. WITNESSETH, that for and in consideration, &c. [of 5000*l.* sterling to A. alone, No. I. pl. 63.] The said A. and Mary his wife, have, and each of them hath, granted, bargained, sold, aliened, released, and confirmed, and by these presents do and each of them both grant, bargain, sell, alien, release, and confirm unto the said B. and C. (in their actual possession, &c.) [No. I. pl. 68], and to his heirs, and assigns, ALL THAT, &c. [Insert parcels and houses]. And also all those twelve negroes and other slaves whose names are enumerated in the schedule to these presents subjoined, together with the future issue and increase of the females thereof; [and the reversion, No. I. pl. 72; and estate of A. and wife, ib. pl. 73]. To HAVE AND TO HOLD the said messuages or tenements, land, and hereditaments, and also the said twelve negro and other slaves, whose names are enumerated in the schedule to these presents subjoined, together with their future issue and increase, and all and singular the premises hereinbefore mentioned, and hereby granted and released, or intended so to be, with their and every of their rights, members, and appurtenances, unto the said B. and C., their and every of their heirs and assigns, TO THE only proper use and behoof of the said B. and C., their heirs and assigns, for ever; subject, nevertheless, to a proviso or condition for redemption hereinafter contained, that is to say,—[Add proviso for redemption, No. I. pl. 79.] AND the said A. for himself, his heirs, executors, and administrators, and for the said Mary his wife, and her heirs, doth covenant, &c. [to pay money, No. I. pl. 87; that A. and wife have good right to convey, ib. pl. 93; that B. and C. shall enjoy after default, ib. pl. 97; free from incumbrances, ib. pl. 98; and for further assurances, ib. pl. 100; proviso that A. shall enjoy till default, ib. pl. 104.] IN WITNESS, &c.

THE schedule to which the above written indenture refers.

No. XXXVIII.

MORTGAGE OF COPYHOLD PREMISES.*

[Antea, p. 1068, of this edition.]

THIS INDENTURE, made, &c.—BETWEEN (mortgagor) [and P. his wife] of the one part, and (mortgagee) of the other part. WITNESSETH, that for and in consideration of the sum of 1500*l.* of good and lawful money, current in England, this day advanced, lent, and paid by the said (mortgagee) to the said (mortgagor), the receipt of which said sum the said (mortgagor) doth hereby admit and acknowledge, &c. [Receipt, No. I. pl. 62]; HE the said (mortgagor), for himself, his heirs, executors, and administrators, [and for the said P. his wife] doth hereby covenant, declare, and agree, to and with the said (mortgagee), his heirs and assigns, that he the (mortgagor), his heirs and assigns, shall and will, at his and their own proper costs and charges, in all things, at or before the next general or other court which shall or may be holden in or for the manor of A. in the county of Gloucester, or other the manor or manors whereof the lands and hereditaments hereinafter described, or any of them are holden, well and effectually surrender, or cause or procure to be well and effectually surrendered, either in person or by attorney, into the hands of the lord or lords, lady or ladies, for the time being of the said manor or manors, or otherwise convey and assure, according to the custom thereof, ALL that, &c. [insert parcels] and also all and singular other the copyhold or customary messuages, lands, and hereditaments of him [them] the said (mortgagor) [and P. his wife], situate and being in A. aforesaid, together with all houses [&c. and all the estate, &c. No. I. pl. 70, ib. pl. 73]; the said surrender and surrenders to be so and in such manner made that the said (mortgagee), his heirs and assigns, shall and may be duly and effectually admitted to all and singular the said messuages or tenements and hereditaments, and be thenceforth lawfully and rightfully entitled to the same for as estate of inheritance therein [and during the term of the natural lives of the said (mortgagor) and P. his wife, in case she shall survive the said (mortgagor), and shall so long continue his widow], at the will of the lord, according to the custom of the said manor, subject only to the customary rents, heriots, suits, and services, payable and to be performed, for and in respect of the same hereditaments [and premises], and which said messuages or tenements and hereditaments [premises] hereby covenanted to be surrendered as aforesaid, with their aid and every of their rights, members, and appurtenances, shall be, and are hereby declared to be meant and intended to be, had, holden, and enjoyed by, and the said surrender and surrenders when made and perfected as aforesaid or in any other manner, shall be and endure to and for the use and behoof of the said (mortgagee), his heirs and assigns [for and during the term of the natural lives of the said mortgagor and P. his wife, in case she shall survive him the said (mortgagor), and shall so long continue his widow], at the will of the lord, according to the custom of the said manor, subject only to the rents, heriots, suits, and services therefore due, and of right accustomed to be paid, rendered, and performed, and subject to the proviso or agreement for redemption of the same premises hereinafter contained, that is to say, [Add proviso, No. I. pl. 77; Covenant by mortgagor to pay money, ib. pl. 87]; AND ALSO that the said (mortgagor) at the time of the sealing and delivery of these presents, is seised to him and his heirs [assigns] of a good, sure, perfect, and indefeasible estate [of inheritance], in his own right and to his own use, at the will of the lord, according to the custom of the said manor, of the messuages or tenements and hereditaments hereby covenanted to be surrendered or otherwise assured or intended so to be, [for and during the term of his natural life], without any manner of trust, condition, power of revocation, or any other matter or thing whatsoever, which can or may revoke, determine, abridge, charge, incumber, or affect the same in any manner howsoever; [And that the said P. his wife, is at the same time lawfully and rightfully seised of or otherwise entitled to the said messuages or tenements and hereditaments hereby covenanted to be surrendered, or otherwise assured or intended so to be, according to the custom of the said manor, in remainder, expectant on the decease of the said (mortgagor), of and for a good, sure, perfect, absolute, and indefeasible estate, for and during the term of her natural life, in case she should so long continue the widow of the said (mortgagor), without any manner of trust, &c.]; AND FURTHER that he [they] the said (mortgagor) [and P. his wife, or one of them] now [have or] hath in [themselves], himself, [or herself,] good right, full power, and absolute right and title to surrender, or cause or procure to be surrendered, all and singular the said messuages or tenements and hereditaments, unto the said (mortgagee), his heirs and assigns, [for and during the natural lives, &c. Add covenant for quiet enjoyment after default, No. I. pl. 91; free from incumbrances, ib. pl. 98; and for further assurances, ib. pl. 100, the conclusion of which runs thus:—“Acts, deeds, conveyances, matters, and things whatsoever, whether by covenant or agreement in writing, surrender or surrenders, or other assurance whatsoever, for the further, better, more perfectly, absolutely, and satisfactorily surrendering, confirming, and assuring the said hereditaments [premises] and every part thereof, with the appurtenances, unto and to the use of the said (mortgagor), his heirs and assigns for ever, [or, for and during the

* Omitting the italics not within brackets, but preserving those so inclosed, this precedent may be adapted to a mortgage of copyhold property for the lives of the mortgagor and the widowhood of his wife.

natural lives of the said (mortgagor), and for and during the natural life of the said P. his wife, in case she shall survive him the said (mortgagor), and shall continue his widow] to be holden of the will of the lord, according to the custom of the manor or manors, in such manner and form as by the said (mortgagee), his heirs, executors, &c." Add proviso that mortgagor shall enjoy till default, No. I. pl. 104.] IN WITNESS, &c.

No. XXXIX. § 1.

RE-CONVEYANCE.

THIS INDENTURE, made, &c.—BETWEEN (mortgagee) of, &c. of the one part, and the (mortgagor) of, &c. of the other part. [Recite mortgage, No. I. pl. 21; default in payment, ib. pl. 22; money due, ib. pl. 36; and that mortgagor is desirous of discharging same, ib. pl. 48.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration [No. I. pl. 63]; HE the said (mortgagee) (by way of release or other assurance only, and not of covenant or warranty) hath granted, bargained, sold, aliened, released, and quitted claim, and by these presents BOTH grant, bargain, sell, release, alien, and quit claim unto the said (mortgagor), in his actual possession, &c. [No. I. pl. 68.] and to his heirs, ALL THAT the said messuage or tenement and hereditaments hereinbefore particularly mentioned and described, and all other the messuages, lands, tenements, and hereditaments, (if any) which were granted and conveyed to him the said (mortgagee), in and by the said hereinbefore in part recited indentures of lease and release and every part and parcel of the same respectively, with their and every of their rights, members, and appurtenances. And the reversion [No. I. pl. 72.] And all the estate, right, title, and interest whatsoever, of him the said (mortgagee), therein or thereto, under or by virtue of the said hereinbefore in part recited indentures of lease and release [or otherwise howsoever]. Together with the said recited indentures, and all other deeds, [&c. No. I. pl. 75]. TO HAVE AND TO HOLD the said messuages or tenements, hereditaments, and all and singular other the premises hereby released, or otherwise assured or intended so to be, with their and every of their rights, members, and appurtenances, unto and to the use of the said (mortgagor), his heirs and assigns for ever, freed and discharged of and from the said sum of 800*l.*, and all interest and other monies whatsoever, now or heretofore due, for and in respect thereof, and of and from all other liens, charges, claims, and demands whatsoever, as well legal as equitable, of or by the said (mortgagee), his heirs, executors, and administrators, upon or concerning the same respectively, by reason of the said hereinbefore in part recited mortgage [or otherwise howsoever]. [Covenant by mortgagor that he has not incumbered, No. I. pl. 85.] IN WITNESS, &c.

No. XXXIX. § 2.

RECONVEYANCE by Indorcement of Part of Lands without Prejudice to the Lien on Remainder.

THIS INDENTURE, made, &c.—BETWEEN the within named B. of the one part, and the within named A. of the other part. WHEREAS the within mentioned sum of 500*l.* is still due and owing from the said A. to the said B.; but all interest for the same hath been paid up to the day of the date of these presents, as he the said B. doth hereby admit and acknowledge. AND WHEREAS, on the application, and at the instance and request of the said A., the said B. hath agreed to release and exonerate the within mentioned and hereby intended to be released piece or parcel of land, situate at D., from the payment of the within mentioned sum of 500*l.* and interest, subject nevertheless and without prejudice to the right of the said B. to retain the residue of the within mentioned lands and hereditaments, as a security for the said sum of 500*l.* and interest. NOW THIS INDENTURE WITNESSETH [Proceed as in No. XXXIX. s. 1. to the parcels describing the within mentioned lot of land intended to be released; and the reversion, &c.; and the estate, &c.; habendum to A. in fee], discharged of and from the security by the within written indenture intended to be given for payment of the said sum of 500*l.* and interest, nevertheless without prejudice to the right of the said B. to retain the residue of the within mentioned lands and hereditaments, as a security for the repayment of the said sum of 500*l.* and in confirmation thereof. [Covenant by B. that he has not incumbered, No. I. pl. 86.] IN WITNESS, &c.

No. XL. § 1.

MEMORANDUM accompanying a Deposit of Deeds by way of Pledge.

BE IT REMEMBERED, that on the 8th day of March, 1820, the title deeds to an estate at Hippley, in the county of Berks, as enumerated and specified in the schedule hereunder written, were delivered by the said (mortgagor) of, &c. to the said (mortgagee) of, &c. in pledge

to secure to the said (*mortgagee*), his executors, administrators, and assigns, the re-payment of the sum of 1000*l.* this day lent and advanced by the said (*mortgagee*) to the said (*mortgagor*), and interest for the same sum after the rate of 5*l.* for every 100*l.* by the year. As WITNESS the hands of the said parties the day and year first above written.

WITNESS to the signing.

(*Mortgagor.*)
(*Mortgagee.*)

THE SCHEDULE *above referred to.*

8th & 9th May, 1801. Indentures of lease and release between A. B. of the one part, and C. D. of the other part. [*Add dates and names of parties of all the deeds.*]

. The above memorandum and schedules are kept by the mortgagee. The following acknowledgment is sometimes required by the mortgagor.

I HEREBY acknowledge that the several deeds and writings above mentioned, were this day received by me; and I hereby undertake to keep them, with the same degree of care as I keep my own deeds and writings and other valuable effects, and upon payment of the said sum of 2000*l.* and interest, I promise and agree to restore the same deeds and writings unto the said (*mortgagor*), his heirs and assigns, undefaced and uninjured (loss or damage by fire, or other inevitable accidents, only excepted.) WITNESS my hand, the 8th day of March, 1820.

WITNESS to the signing.

(*Mortgagee.*)

†† The following Schedule will also create an equitable Deposit.

A SCHEDULE of the several deeds and writings relating to an estate at Vernham, Hants, delivered by (*mortgagor*) of, &c. to (*mortgagee*) of, &c. in pledge for securing the payment by the said (*mortgagor*), his heirs, executors, and administrators, unto the said (*mortgagee*), his executors, administrators, and assigns, of the sum of 2000*l.* and interest at 5*l.* per cent. per ann.

1st & 2d March, 1743. Indentures of lease and release between A. B. of the one part, and C. D. of the other part. [*Add dates and names of parties of all the deeds.*] As WITNESS the hands of the said parties the 5th day of July, 1822.

WITNESS to the signing
A. B.

(*Mortgagor.*)
(*Mortgagee.*)

No. XL. § 2.

BOND for Payment of Money, also secured by a Deposit of Title Deeds.

[BOND in common Form from A. B. to C. D. Antea, No. VII. § 1.]

WHEREAS the above named C. D. hath this day lent and advanced unto the above bounden A. B. the sum of 150*l.* at interest; and on the treaty for the loan, it was agreed, that the re-payment of the same sum and lawful interest should be secured unto the said C. D., his executors, administrators, and assigns, by the above written bond or obligation, conditioned as hereinafter mentioned, and also by a deposit of the lease and assignment of a leasehold house, situate in St. John's Square, Clerkenwell, now in the occupation of the said A. B. (and which by the said assignment is assigned to him, his executors, administrators, and assigns) as a collateral or equitable security for the said sum of 150*l.* and interest; and the said A. B. hath accordingly deposited with the said C. D., the lease and assignment of the said premises as such collateral or equitable security as aforesaid, as they the said A. B. and C. D. do hereby respectively acknowledge, testify, and declare. NOW THE CONDITION of the above written bond or obligation is such, that if the above bounden A. B., his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid, unto the said C. D. his executors, administrators, and assigns, at or in his now dwelling house, situate at Peckham aforesaid, the said sum of 150*l.*, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 10th day of October now next ensuing, without any deduction or abatement whatsoever, for or in respect of the same or otherwise howsoever; then the above written bond or obligation shall be void, or else remain in full force and virtue.

Signed and sealed (being first duly stamped), in the presence of

A. B.
C. D.

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Y.**YEARS,** recital of mortgage for, ii. 1104.

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FINIS.

ERRATA ET CORRIGENDA.

Line.

- 60, for *recovery* read *re-convey*.
 21, for *mortgagor* read *mortgagee*.
 51, for *mortgagor* read *mortgagee*.
 29, for *copper* read *coppers*.
 33, for 230 read 130.
 34, for 1 *Vern.* read 2 *Vern.*
 23, for *seller* read *settlor*.
 second marginal note, for *obtain*
read prevent.
 45, for *the omission* read *the reason of*
the omission.
 27-28, dele *et vide Meade v. Bandon,*
2 Dow. Par. Ca. 269.
 33, to 174 add of *this edit.*
 marginal note, for *nor* to read *lessee*
of disseisor not entitled to.
 dele whole of note (M.)
 for *reverse* in note (p) read *same*.
 in the second marginal note, for
mortgagor read *mortgagee*.
 1, for *simile* read *simile*.
 26, for *have* read *has*.
 5, of the first marginal note, for *mort-*
gagor read *mortgagee*.
 20, for *shall* read *should*.
 bring down the marginal placitum
 opposite note (N) to note (O),
 and remove the present placitum
 of note (O) to the second
 paragraph of the same note.
 25, for 135 read 165.
 32, for *A* read *And*.
 21, dele *of*.
 dele the whole of note (I).
 46, for *contracts* read *contract*.
 the second marginal note should
 read thus, *for, not being bound as*
to debts which must be paid first,
he cannot as to legacies.
 43, for *cessat* read *cesset*.
 32-3, dele—*though in Barnes v. Kinnas-*
ton, postea, 776, it is said to be in
the nature of a chose in action.
 58, dele the second *of*.
 37, add 1 *ib.* 238.
 45, after *mortgage* add *Gladman v.*
Henchman, infra, 976.
 37, dele *not*.
 third marginal note, dele *not*.
 61, dele *of it*.
 55, for *IX. 2.* read *IX. 3.*
 34, after *mortgagor* add *Price v. Fast-*
nedge, Amb. 680.

Page. Line.

- 351 32, dele from *But although to simple con-*
tract debts, eight lines.
 357 52, for *Mackreth* read *Mackworth*.
 359 n. (x) for *antea, 401,* read *antea, 352.*
 377 15, for *Lord Eldon* read *Lord Rosslyn*.
 402 28, at the end of the line, add 133.
 449 49, for *agreement* read *assignment*.
 481 third marginal note, for *distinction*
read no distinction.
 491 12-13, for *power to charge estates with*
portions read *power to raise a sum*
on certain estates for portions.
 496 22, dele [*Qu. refused.*].
 528 to the third marginal note add
-sected by.
 549 62, for *Dow. P. C.* read 1 *Dow. P. C.*
 558 28, for *the mortgagor and his heir if*
bound, read the mortgagor's heir
at law if bound.
 558 37, after *foreclose,* add *et vide infra,*
2d vol. p. 1017, of this edit.
 553 47, in the marginal note, for *Voluntary*
read General.
 672 to the last line add *et vide infra,*
1042, of this edit.
 682 third marginal note, for *mortgagee*
having notice read *mortgagee*
having no notice.
 684 third marginal note, dele *is.*
 684 47, for *exonerated the* read *exonerated*
of the.
 704 to the second marginal note add
fine, of her share in New River,
ceases with coverture.
 774 last line, for *division* read *chapter*.
 796 last line but one in marginal note,
 for *found* read *fund*.
 934 13, for *No. XXXII.* read *No. XXXIII.*
 993 correct the fourth marginal note
 thus, *Solicitor taking mortgage*
from client without statement of
account, decreed to pay costs.
 996 last line, add *See further on the sub-*
ject of this note, Boamen on Costs
in Equity, 39, 104.
 1022 marginal paging, for [1101] read
 [1104].
 1035 correct the first marginal note thus,
mortgagee may assign, notwith-
standing he has not entered on land.
 1062 9, for *vendee* read *vender*.
 1070 fourth marginal note, dele *before*.
 1111 41, for *now* read *own*.

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